Public Prosecutor v Ayyavoo a/l Subramaniam & Anor

HIGH COURT (IPOH) — CRIMINAL TRIAL NO 45–33 OF 2002
VT SINGHAM J
30 SEPTEMBER 2003

Evidence — Identification evidence — Conduct of identification parade — Accused persons identified at identification parade — Witness saw accused in handcuffs prior to identification parade — Whether rendered superfluous — Manner in which identification parade was conducted — Age, height and clothings of accused persons as opposed to age, height and clothings of other participants — Whether there was a glaring disparity — Value of identification parade

Evidence — Re-examination — Witnesses — Purpose, object and rationale of re-examination — Failure of DPP to re-examine witness — Implication of such failure

Criminal Law — Penal Code (Malaysia) — s 34 — Common intention — Both accused persons charged under s 302 Penal Code — Evidence of relationship — Whether a common design existed between accused persons and person at large to commit crime

The accused persons were charged with murder, an offence punishable under s 302 read with s 34 of the Penal Code.

The prosecution introduced evidence through 12 witnesses to testify against both the accused persons with their key witness being a 76 year old man (PW6) who had identified the accused persons as being responsible for the death of the deceased. Two separate identification parades were held, one conducted by Inspector Koay (PW7) to identify the first accused and the other by ASP Ang (PW8) to identify the second accused. According to PW6, prior to the first identification parade, the first accused who was handcuffed was shown to him by PW7.

The issues for consideration by the court involved: (a) evidence of identification of the accused persons by PW6; and (b) the doctrine of common intention.

Held, acquitting both accused persons:

(1) Section 9 of the Evidence Act 1950 is relevant to this case in so far as to establish the identity of the persons responsible for the murder of the deceased (see para 10).

(2) An identification parade is held where there is doubt as to the identity of the person who is alleged to have committed the offence with which he is charged, or where the accused persons are not previously known to the victim (see para 17).

(3) An identification parade should be conducted in such a professional and independent fashion that it would not lead to any suspicion or cast any doubt that the suspect who was put up in the identification parade was picked up or identified by the witness only because he had the opportunity to see the suspect at the police station on the same day or at about the time before the witness proceeded to identify the suspect at the identification parade. It is very important for the court in determining the credibility of the witnesses on the point of identification (see para 19).

(4) Police officers who are in charge of identification parade must take all necessary precautions and safeguards to ensure that the witness who would be called to identify a suspect did not have any opportunity to see or even have a glance of the suspect prior to the identification parade. This is crucial in cases where the suspect and the witness were not known to each other and also where the witness had only a little opportunity or under difficult circumstances to have a view of the suspect of the place of the crime (see para 20).

(5) PW6 testified that he had identified the first accused whom he had earlier seen in handcuffs of the police station prior to identifying him at the identification parade. Therefore, the identification of the first accused of the identification parade was superfluous and was of no practical value as it had gone against the rule and whole purpose of having an identification parade which no doubt should be independent and fair (see para 26).

(6) Another unsatisfactory feature of this case was the manner in which the identification parade was conducted in relation to the first accused. The first accused was 21 years old at the time of the offence and the participants in the identification parade were of ages 18, 19, 29, 30, 32 and 33 (see para 14).

(7) The identification parade was conducted with flaws and unfairness by the investigation agency and in addition to the fact that it took place 1 year 6 months later, rendered it unreliable (see para 26).

(8) In relation to the identification of the second accused, it was the evidence of the arresting officer and the investigating officer that the second accused was arrested only on 25 January 2002 whereas it was the evidence of PW6 that he had identified the second accused at the identification parade held on 22 January 2002. A grave doubt was therefore created in the prosecution's case. There was also glaring disparities in the manner of which the parade was conducted in the form of the clothes worn by the second accused compared to the others in the parade, in addition to their height and appearance (see paras 27, 29 and 30).

(9) The DPP had failed to re-examine PW6 on the discrepancies which raised a doubt in favour of the second accused. The DPP had also failed to take advantage of the opportunity accorded to the prosecution to re-examine its own witness (see para 28).

(10) There was no evidence as to the relationship, or of a common design, of both accused persons with the other two persons who had assaulted the deceased and who were supposedly at large. The doctrine of common intention therefore could not apply to the accused persons, unless there was evidence of a prior meeting of minds to form the pre-arranged plan to commit the offence at the interval prior to the attack of even if the intention had developed on the spot (see para 68 and 86).

(11) Any inference of common intention as termed in s 34 of the Penal Code could only be invoked if there is necessary inference deducible from the circumstances of the case. Common intention does not mean same or similar intention (see para 86).

(12) The prosecution had failed to establish a *prima facie* case against both accuseds on the charge of murder and the identity of the person or persons responsible for the offence charged or any other offence on the date, time and place as framed by the prosecution (see para 118).

[**Bahasa Malaysia summary**

Kedua-dua tertuduh disabitkan dengan kesalahan membunuh, suatu kesalahan yang boleh dihukum di bawah s 302 dibaca bersama s 34 Kanun keseksaan.

Pihak pendakwa telah mengemukakan bukti melalui 12 saksi-saksi untuk memberi keterangan terhadap kedua-dua tertuduh dengan saksi utama mereka seorang lelaki yang berumur 76 tahun (PW6) yang telah mengenal pasti yang tertuduh sebagai pihak yang bertanggungjawab terhadap kematian si mati. Dua perbarisan cam telah diadakan, satu yang dijalankan oleh Inspektor Koay (PW7) untuk mengenal pasti tertuduh pertama dan satu lagi oleh ASP Ang (PW8) untuk mengenal pasti tertuduh kedua. Menurut PW6, sebelum perbarisan cam pertama, tertuduh pertama yang telah digari telah ditunjukkan kepadanya oleh PW7.

Isu-isu yang perlu dipertimbangkan oleh mahkamah merangkumi: (a) bukti kenal pasti yang tertuduh oleh PW6; dan (b) doktrin niat bersama.

Diputuskan, membebaskan kedua-dua tertuduh:

(1) Seksyen 9 Akta Keterangan 1950 terpakai kepada kes ini dalam membuktikan identiti pihak-pihak yang terlibat dengan pembunuhan si mati (lihat perenggan 10).

(2) Suatu perbarisan cam dijalankan di mana terdapat keraguan dengan identiti orang yang dikatakan telah melakukan kesalahan yang disabitkan terhadapnya, atau di mana yang tertuduh tidak dikenali oleh si mangsa sebelum ini (lihat perenggan 17).

(3) Suatu perbarisan cam harus dijalankan dalam cara profesional dan terkecuali dalam mana ia tidak akan mendatangkan rasa sangsi atau keraguan di mana suspek yang dihadapkan dalam perbarisan cam telah dipilih atau dikenal pasti oleh saksi hanya kerana dia telah diberi peluang untuk melihat suspek di balai polis di hari yang sama atau lebih kurang pada masa saksi sedang menuju untuk mengenal pasti pada perbarisan cam. Ia adalah sangat penting untuk mengenal pasti kredibiliti saksi pada masa pengenalan pasti (lihat perenggan 19).

(4) Pegawai polis yang bertugas semasa perbarisan cam harus mengambil segala langkah berjaga-jaga yang perlu untuk memastikan bahawa saksi yang akan dipanggil untuk mengenal pasti suspek tidak mendapat peluang untuk melihat atau melihat secara imbas sebelum perbarisan cam diadakan. Ini adalah penting di mana suspek dan saksi tidak mengenali satu sama lain dan juga di mana saksi hanya mendapat sedikit peluang atau telah melihat suspek di tempat kejadian kesalahan dalam keadaan sukar (lihat perenggan 20).

(5) PW6 telah memberi keterangan bahawa dia telah mengenal pasti tertuduh pertama setelah melihatnya terlebih dahulu semasa yang

tertuduh digari sebelum mengenal pastinya di dalam perbarisan cam. Maka, ini menjadikan perbarisan cam tersebut tidak berguna kerana ia telah melanggar rukun dan tujuan mengadakan perbarisan cam yang tanpa ragu-ragu harus terkecuali dan adil (lihat perenggan 20).

(6) Satu lagi fakta yang kurang memuaskan dalam kes ini adalah cara perbarisan cam dijalankan berkenaan dengan tertuduh pertama. Dia berumur 21 tahun pada masa berlakunya kesalahan dan orang-orang yang dikemukakan dalam perbicaraan cam tersebut berumur 18, 19, 29, 30, 32 dan 33 (lihat perenggan 14).

(7) Pengendalian perbarisan cam oleh agensi penyiasatan yang penuh dengan kecacatan dan ketidakadilan, dan tambahan dengan fakta bahawa ia dijalankan 1 tahun 6 bulan kemudiannya, menjadikannya tidak boleh diharapkan (lihat perenggan 26).

(8) Berkenaan dengan pengenalan pasti tertuduh kedua, adalah keterangan pegawai penangkapan dan pegawai penyiasatan bahawa tertuduh kedua ditangkap pada 25 Januari 2002 manakala mengikut keterangan PW6, dia telah mengenal pasti tertuduh kedua semasa perbarisan cam yang dijalankan pada 22 Januari 2002. Ini menimbulkan syak wasangka yang tinggi di dalam kes pendakwa. Terdapat juga percanggahan ketara dalam pengendalian perbarisan cam tersebut dalam bentuk pakaian yang dipakai oleh tertuduh kedua, termasuk juga ketinggian dan penampilan mereka. (lihat perenggan 27, 29 dan 30).

(9) Timbalan pendakwa raya ('TPR') gagal untuk memeriksa semula PW6 mengenai percanggahan yang wujud dan ini menimbulkan keraguan yang berpihak kepada tertuduh kedua. TPR juga gagal mengambil kesempatan untuk memeriksa semula saksi-saksinya sendiri (lihat perenggan 28).

(10) Tidak terdapat bukti kewujudan hubungan, atau bukti pembentukan bersama, di antara kedua-dua tertuduh dan dua orang lagi yang telah memukul si mati dan dikatakan bebas. Maka dengan itu, doktrin niat bersama tidak terpakai kepada pihak tertuduh, hanya jika terdapat bukti pemikiran bersama untuk membentuk suatu langkah untuk melakukan kesalahan pada seketika waktu sebelum melakukan kesalahan walaupun niat itu terwujud pada masa itu (lihat perenggan 68 dan 86).

(11) Inferens niat bersama seperti yang diperuntukkan di bawah s 34 Kanun Keseksaan hanya terpakai sekiranya terdapat inferens yang perlu yang boleh didapati daripada keadaan sekeliling kes semasa. Niat bersama tidak bermaksud niat yang sama atau serupa (lihat perenggan 86).

(12) Pihak pendakwa gagal mewujudkan suatu kes prima facie terhadap kedua-dua tertuduh atas tuduhan membunuh dan juga identiti orang yang bertanggung jawab untuk pertuduhan yang dimajukan atau tuduhan-tuduhan yang lain pada tarikh, masa dan tempat yang dimajukan oleh pihak pendakwa (lihat perenggan 118).]

Notes

For cases on common intention, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 46–48

For cases on conduct of identification parade, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1621–1623
For common intention, see 11 *Halsbury's Laws of Malaysia,* paras [190.055] and [190.013]
For identification parade, see 12 *Halsbury's Laws of Malaysia*, para [210.066]
For re-examination, 12 see *Halsbury's Laws of Malaysia,* paras [210.006] and [210.171]

Cases referred to

(Junior) Reid v The Queen (PC) [1989] 3 WLR 771 (refd)
Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1 (folld)
Arthurs v Attorney-General for Northern Ireland [1971] 55 Cr App R 161 (refd)
Arumugam s/o Muthusamy v PP [1998] 3 MLJ 73 (dist)
Awadh Singh v The State 1954 AIR Patna 483 (Vol 41, CN 166) (folld)
Balwant Singh v PP (1960) 26 MLJ 264 (folld)
Chan Sin v PP (1949) 15 MLJ 106 (folld)
Chew Cheng Lye v Reg (1956) 22 MLJ 240 (refd)
Choo Chang Teik & Anor v PP [1991] 3 MLJ 423 (refd)
Chooi Kam Woh v Regina (1954) 20 MLJ 264 (refd)
Chow Kok Keong v PP [1998] 2 MLJ 337 (refd)
DA Desai and Khalid AIR 1984 SC 1717 (refd)
Dato' Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232 (refd)
Eng Sin v PP [1974] 2 MLJ 168 (refd)
Gray 12 Cr App Reports 244 (refd)
Heng Aik Ren Thomas v PP [1998] 3 SLR 465 (refd)
Husein Juna Dafar v State of Gujarat [1986] 3 Crimes 229 (Guj) (DB) (folld)
Ibrahim v PP (1962) 28 MLJ 235 (folld)
Isa bin Che Noh v PP (1956) 22 MLJ 93 (refd)
Jaafar bin Ali v PP [1998] 4 MLJ 406 (folld)
Joginder Singh v State of Haryana AIR 1994 SC 461 (folld)
John James Haslam [1925] Crim App Rep 59 (folld)
Juraimi Husin v PP [1998] 1 MLJ 537 (refd)
Kalimuthu v PP (1955) 21 MLJ 187 (refd)
Kamaruzaman Mat Hassan & Anor v PP [1996] MLJU 537; [1997] 5 CLJ 279 (refd)
Kanan & Ors v State of Kerala AIR 1979 SC 1127 (folld)
Kiew Foo Mui & Ors v PP [1995] 3 MLJ 505 (refd)
Kripal v State of Uttar Pradesh AIR 1954 SC 706 (refd)
Krishnan v PP [1987] 1 MLJ 292 (refd)
KS Roberts v PP [1970] 2 MLJ 137 (refd)
Lee Lian & Ors v PP (1956) MLJ 191 (refd)
Lee Yoon Choy and 2 Ors v PP (1949) 15 MLJ 66 (refd)
Leow Nghee Lim v Reg (1956) 22 MLJ 28 (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65 (folld)
Low Thim Fatt v PP [1989] 1 MLJ 304 (refd)
Mahinder Singh v PP [1967] 1 MLJ 126 (refd)
Maidin Pitchay & Anor v PP [1968] 1 MLJ 82 (dist)
Mamand v Emperor AIR 1946 PC 45 (refd)
Mehtab Singh & Ors v State of Madhya Pradesh AIR 1975 SC 274 (refd)
Mohd Samsudin bin Ismail v Tan Yeow Hwa & Anor [2000] 7 MLJ 24 (refd)
Muhamad Safarudin Baba & Anor v PP [2002] 4 CLJ 210 (refd)
Muharam bin Anson v PP [1981] 1 MLJ 222 (refd)

Namasiyiam & Ors v PP [1987] 2 MLJ 336 (refd)
Ng Ah Kiat v PP [1987] 2 MLJ 336 (refd)
Ong Poh Cheng v PP [1998] 4 MLJ 8 (dist)
Ooi Leong Heng lwn PP, Criminal Appeal No 09-3-2001 (decision of the Court of Appeal given on 26 February 2004) (refd)
Pandurang v State of Hyderabad AIR 1955 SC 216 (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137 (folld)
Pavone v PP (No 2) [1986] 1 MLJ 423 (refd)
Phoon Liat Sum v PP (1950) 16 MLJ 205 (folld)
PP v Mardai (1950) 16 MLJ 33 (refd)
PP v Amar Singh (1948-49) MLJ Supp 55 (refd)
PP v Chan Han Choon & Ors [1989] 2 MLJ 427 (refd)
PP v Kasmin bin Soeb [1974] 1 MLJ 230 (refd)
PP v Kau Joo Huat [1988] 2 MLJ 91 (refd)
PP v Lee Pak (1937) 6 MLJ 265 (refd)
PP v Lim Teong Seng and 2 Ors (1946) 12 MLJ 108 (refd)
PP v Mohamed bin Majed [1977] 1 MLJ 121 (refd)
PP v Muhamad Nasir bin Shaharuddin & Anor [1994] 2 MLJ 576 (refd)
PP v Ong Cheng Heong [1998] 6 MLJ 678 (dist)
PP v PasupathyKanagasaby [2001] 2 MLJ 143 (folld)
PP v R Balasubramaniam (1948) 14 MLJ 119 (folld)
PP v Saimin & Ors [1971] 2 MLJ 16 (folld)
PP v Sarjeet Singh & Anor [1994] 2 MLJ 290 (refd)
Provash Kumar Bose v The King AIR 1951 Cal 475 (refd)
R v Bundy 5 Cr App R 272 (refd)
R v Cartwright (1914) 10 Cr App R 219 (folld)
R v Chapman 7 CR App Rep 53 (folld)
R v Courtie [1984] 1 All ER 740 (folld)
R v Dickman [1910] 74 JP 449 (refd)
R v Dickman 5 CR App Rep 135 (folld)
R v Kelly (1992) 92 DLR (4th) 643 (SCC) (refd)
R v Osborne, R v Virtue [1973] 1 All ER 649 (refd)
R v Searle and Others [1971] Crim LR 592 (refd)
R v Wallace 23 Cr App 32 (refd)
Rangula & Anor v PP [1982] 1 MLJ 91 (refd)
Sarwan Singh Rattan Singh v State of Punjab, and State of Punjab and Harbans Singh Bhan Singh, and Harbans Singh Bhan Singh v State of Punjab AIR 1957 SC 637 (refd)
Seneviratne v R [1936] 3 All ER 36 (refd)
Shand v R [1996] 1 All ER 511 (refd)
Sia Soon Suan v PP [1966] 1 MLJ 116 (refd)
State v Wahid Bux AIR 1953 All 314 (refd)
Tan Boon Kean v PP [1995] 3 MLJ 514 (refd)
Tansley v Painter 1969 Crim LR 139 (folld)
The People (At the suit of the Attorney-General) v Dominic Casey (No 2) (1) 1962 IR 33 (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433 (refd)
Udai Lal v State of Rajasthan 1994 Cri LJ 509 (Raj) (refd)
Wong Nyet Wah v PP (1962) 28 MLJ 312 (refd)
Woolmington v DPP [1935] AC 462 (folld)
Yau Heng Fang v PP [1985] 2 MLJ 335 (folld)
Zahari bin Yeop Baai & Anor v PP [1980] 1 MLJ 160 (folld)

Legislation referred to

Evidence Act 1950 s 9
Indian Penal Code s 302
Penal Code ss 34, 302, 304, 387, 392, 397, 414, 436, 451
Road Traffic Ordinance 1958 ss 74(1), 92(1)

VT SINGHAM J:

[1] In this case, the charge against both the accused-persons is as follows:-

> Bahawa kamu bersama-sama pada 13 Januari 2002 antara jam lebih kurang 11.00 pagi hingga 12.00 tengah hari di pondok jaga di kebun durian Leong Sin Nam, Ulu Piah, Tambun, Ipoh di dalam Daerah Kinta, di dalam Negeri Perak, bersama-sama dengan dua orang yang masih bebas telah melakukan pembunuhan dengan menyebabkan kematian LEE KIN CHONG, NO. K/P: 500722-08-5335 dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s 302 Kanun Keseksaan dan dibaca bersama seksyen 34 Kanun yang sama.

[2] The prosecution introduced evidence through 12 witnesses to testify against both the accused persons of which the key witness of the prosecution was one Yau Kim Pong, (PW6) who was 76 years old. The witnesses for the prosecution were as follows:-

i PW1 was the police corporal who received information through the telephone on 13 January 2002 at/about 12 noon that *there was a robbery* at the durian orchard at Leong Sin Nam, Ulu Piah, Tambun where the incident occurred on 13 January 2002 at/about 12pm;

ii PW2 was the police photographer;

iii PW3 was the medical officer who conducted the post-mortem on the deceased;

iv PW4 was the police corporal who was instructed to serve the subpoena on the wife of the deceased (PW5);

v PW5 is the wife of the deceased who identified the deceased at the hospital;

vi PW6 is the key witness who testified that he had witnessed the assault on the deceased;

vii PW7 is the police officer who conducted the first identification parade on 22 January 2002 at the Old Town Police Station Ipoh where the first accused was identified;

viii PW8 is the police officer who conducted the second identification parade on 30 January 2002 at the Kg Bahru police station, Ipoh where the second accused was identified;

ix PW9 is the police Sgt Major who was informed by PW1 on 13 January 2002 at/about 12 noon that someone was assaulted at the durian orchard Ulu Piah, Tambun. PW9 then proceeded to the place of incident where he saw the deceased lying at the hut of the durian orchard. He then informed the investigating officer (PW12);

x PW10 is the police Sgt Major who arrested the second accused on 25 January 2002 where the second accused was at the front of the police station, Tanjung Rambutan;

xi PW11 is the police officer who arrested the first accused on 13 January 2002;

xii PW12 was the investigating officer.

[3] At the close of the prosecution case, this court acquitted and discharged both the accused persons without calling for their defence on the ground that the prosecution had failed to establish a *prima facie* case against both the accuseds.

[4] The prosecution's case amongst others rested on two main issues, being:-

(i) the identification of both the accuseds by PW6; and

(ii) the doctrine of common intention.

[5] It is therefore of *utmost* importance for this court to scrutinize the evidence closely so that before the identification of the accused persons is made the foundation of guilt, the identification itself is found to be fair and free from all taints. The fact of identification of a person is relevant and admissible in evidence under s 9 of the Evidence Act 1950 (see *Law of Evidence* 16th Ed 1996 Vol I by Sir John Woodroffe and Syed Amir Ali.) As for the finding of c*ommon intention*, it must be based on the totality of the circumstances so that any inference which is drawn is not based on conjecture or speculation but certainty.

[6] As the evidence of Yau Kim Pong (PW6), the key prosecution witness is of vital importance to this case, it is appropriate to state briefly his evidence which is as follows:-

Examination in chief of PW6

On 13 January 2002, he was working in a durian orchard as a watchman and his employer was the deceased. On that date at/about 11.00 a.m., the deceased was assaulted. At first, *two male Indians came on a m/cycle and about five minutes later, two other male Indians came on a m/cycle. The two male Indians who came later were identified as the first and second accused.* All the four male Indians wanted to buy durians. After the four male Indians wanted to buy durians, the deceased and himself asked for RM5 but they offered RM4. The deceased opened up the durians for them to eat. After having taken the durians, one of the four Indians made the payment. The deceased then took out money to return the balance of the money. At the time, when the deceased took out to pay the balance, there were a lot of money in the deceased's hand ie there was RM50, RM10, RM5 and RM1 notes. Then he saw the other two male Indians strangling the deceased's neck and one of the said two persons took a chair and hit the deceased. *Both the persons who strangled and hit the deceased were not both the accused.* Only one chair was used to hit the deceased. When the prosecution showed both the chairs to the witness, he could not confirm which chair was used to hit the deceased and he did not recognise both the chairs although he said one of the chairs looked like the chairs at the hut in the durian orchard. After that, one of the remaining two Indians strangled PW6's

neck and he precisely stated that this person was not the two other Indians who assaulted the deceased. This person who strangled PW6's neck then put his hand into the pocket to look for money and PW6 told him that he had no money. The same person who strangled him then punched him. He was assaulted by two persons. PW6 identified the second accused as the person who strangled him and the first accused as the person who attacked him. *When he was attacked, he was dizzy* and after that he heard "Poh, Poh" two or three times which came from the voice of the male Indian. According to him "Poh, Poh, Poh" means "run".

At the time, when the deceased was assaulted, he was about 10 feet away. After the second accused had released him, they ran on their m/cycles. He then went to see the deceased but he did not know whether the deceased had died or not. *At the time when the deceased was assaulted, he did not give any assistance to the deceased because at that time he was taking mineral water and even after that he did not give any assistance to the deceased because he did not know how to assist him.* At the time the deceased was assaulted, PW6 was attacked by another person who strangled him. *He could not help the deceased because he was being strangled. Before the incident where the deceased was assaulted, he does not know where the deceased went.* The deceased came to the durian orchard at/about 11.00 a.m. *He can remember the colour of the clothings of the first accused who wore a t-shirt, part of which was blue and another part was white. The first accused wore long pants jeans which was grey in colour.* PW6 identified the pants which was worn by the first accused. Before the incident, all the four male Indians talked to each other but he could not understand the conversation. All four of them shared one durian.

On 22 January 2002, he attended an identification parade. He understands what was an identification parade and that he was taken to identify the person who assaulted the deceased. He could still remember the officer who held the identification parade and can identify him. He said it was a Malay officer and one of the officer was Chinese. He identified Insp Koay Seng Chye (PW7) as the Chinese officer. He said PW7 was the officer who told him to identify the male Indian. He identified the first accused at the identification parade.

On 30 January 2002, he attended another identification parade *at the police station, Buntong.* He identified ASP Ang Ah Ban (PW8) as the officer who conducted the identification parade on 30 January 2002. *He identified the first accused in this identification parade.* He had attended three identification parades; (i) at the first identification parade, he identified the second accused, (ii) at the second identification parade, he identified the first accused at the police station Buntong, (iii) at the third identification parade, he identified the first accused.

[7] Under cross-examination by counsel for the second accused, PW6 testified as follows:-

There were no other people working in the orchard beside the deceased and himself. *He personally did not inform the police of the incident.* After the incident, he does not know when the police came to the orchard. *The two Indians who came later came about five minutes after the first two Indians had come.* The four Indians parked their two m/cycles at the orchard. *He did not see the m/cycles and does not know the model of the m/cycles. He knew they came by m/cycles because he heard the sound of the m/cycles*. He was taken to the hospital by his friend after he was attacked. His friend who took him to the hospital was informed of the incident. The person who took the deceased to hospital was a Chinese and not the police.

He admitted that the two male Indians who came later did not talk to the deceased. The first time, the deceased was attacked, he was about 10 feet away from them and was

taking mineral water and then he saw the two male Indians assaulting the deceased. When the deceased was attacked, he did not run away and he could not help the deceased as he himself was strangled by another Indian. At the time when he was taking mineral water, he saw the deceased being attacked and when the deceased fell, he was strangled. He admitted that he and the deceased were not attacked at the same time. He does not know the colour of the clothings of the two persons who attacked the deceased. The second accused strangled him. The first time, he attended the identification parade was at the Police Station, Old Town, Ipoh and he cannot remember the date. Before the identification parade was held, he did not go to the police station Old Town, Ipoh. *He identified the second accused at the first identification parade.*

[8] Under cross-examination by counsel for the first accused, PW6 testified as follows:-

He does not know the colour of the m/cycles and did not see the number of the m/cycles. The four Indians who came to the orchard did not wear helmets. *He could only remember the clothings worn by the two Indians and cannot remember the clothings worn by the other two Indians. He admitted when the four Indians were having durian, he did not pay attention. He admitted the assault took place less than five minutes. He was frightened when he was strangled and during the five minutes when he was strangled, he did not help.* He fell when he was strangled. He disagreed that he could not recognize the person who attacked him under that situation. *The two Indians who attacked him were dark-skinned*. After he was assaulted, he was sent to the hospital by his Chinese friend. After the incident, another friend Ah Yeap informed his friend Ah Chai Chai to send him to hospital. *He was not unconscious but he was only dizzy. After the incident, his friend Ah Chai Chai came to the orchard and sent him to the hospital. It was Ah Yeap who informed him that it was Ah Chai Chai who sent him to the hospital.* He denied that he does not know how he was sent to the hospital apart from being informed. *In actual fact, he had informed Ah Yeap of the incident and it was Ah Yeap who telephoned Ah Chai Chai to send him to the hospital. Ah Yeap had come to the orchard about 15 minutes after the incident.* Before Ah Yeap came about 15 minutes later, he had screamed and asked for help. In his statement to a Malay police officer, he had informed that both Ah Yeap and Ah Chai Chai were involved in sending him to the hospital. He disagreed that after the assault, he was unconscious and he does not know who had assaulted him and who had sent him to the hospital. *At the hospital, there was a pondok polis but he did not lodge a police report because the medical officer did not advise him to lodge a police report.* He was hospitalised for only one day and no police officer came to take a statement from him. After he was discharged from the hospital, a police officer came to his house and took him to the police station. At the police station he spoke to Insp Koay Seng Chye (PW7). At the time when he gave a statement to a Malay police officer. He saw PW7 a day after he saw the Malay police officer. He was taken to Balai Polis from his house three times on alternate days.

PW7 had told him that an arrest was made regarding the incident and told him to see the person who was arrested. At that time, the person who was arrested was handcuffed and he was outside the police station at a different place. He was told by PW7 to identify the person who was arrested and later he identified the person who was handcuffed. He was taken to the police station on two other times. The first time, he went to the police station he was asked to identify the person who was involved in the incident. He went twice to the police station Ipoh to identify the person who was involved in the incident.

[9] Under re-examination, PW6 testified as follows:-

The distance between the two m/cycles which arrived was close to each other.

After he was assaulted and strangled, he felt pain and screamed. After that he saw his boss who was assaulted lying. He saw blood oozing out of the nose and mouth. After that, the Indians took money from his boss and ran by saying "Poh, Poh, Poh" three times. *After that, he got up and screamed for help and then Ah Yeap came to the durian orchard*. Ah Yeap saw his injuries and the condition of his boss and telephoned Ah Chai Chai. He did not see who took the deceased to the hospital. *A few minutes after his boss was assaulted, he was also assaulted. His boss was assaulted before he was assaulted. The incident happened nearly at the same time*. The purpose of him going to the police station three times was the first time, a statement was recorded from him, the second time was to identify the persons who were involved in the incident and the third time, he was taken to Balai Polis Buntung to identify people. The second time, he was taken to Balai Polis Ipoh to identify people three times. By three times, he meant he was going and returning like going and coming. He was in the office of the police officer during the identification parade. At the Balai Polis Ipoh, he identified two Indians.

Section 9 of the Evidence Act 1950

[10] Section 9 of the Evidence Act 1950 is relevant to this case in so far as to establish the identity of the persons responsible for the murder of the deceased.

Facts necessary to explain or introduce relevant facts

Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which *establish the identity of any thing or person whose identity is relevant,* or fix the time or place at which any fact in issue or relevant fact happened or which show the relation of parties by whom any such fact was transacted, *are relevant so far as they are necessary for that purpose.*

[11] In order to identify both the accused persons as being responsible for the death of Lee Kin Chong, deceased, the investigating officer, ASP Shazeli bin Kahar (PW12) had instructed two separate identification parades to be held, one was conducted by Insp Koay Seng Chye (PW7) to identify the first accused and the other identification parade was conducted by ASP Ang Ah Ban (PW8) to identify the second accused. In this case, PW6 has testified that he had identified the first accused at the identification parade and that person who was handcuffed was shown to him by PW7 at the police station prior to the identification parade.

[12] Facts necessary to introduce a fact to establish the identity of the suspect whose identity is relevant. [See *Sarkar's Law of Evidence* 15th Ed, 1999 Vol 1 (pp 209–231)].

Showing the identifying witnesses two good photographs of the accused before process of identification is improper and conviction cannot be sustained. It is one thing for a police officer in doubt upon the question of arrest to show a photograph to persons in order to obtain clue. But it is most improper to inform a witness beforehand who has to be called as an identifying witness, by the process of making the features of the accused person familiar to him … . If the intention is to rely on the identification of the suspect by a witness his ability to identify should be tested without showing him the suspect or his photograph, or furnishing him the data for identification … .

… Improvements made by the witness regarding description of the accused and clothes worn by him raise a suspicion regarding the identification of the accused by the witness [*Udai Lal v State of Rajasthan* 1994 Cri LJ 509, 511 (Raj)].

Identification by a witness of an accused who was not known to him, prior to the incident is valueless *[Harish Narvarla Mistry v State of Gujarat* [1993] 1 Crimes 451 (Guj)] …

… Identification of culprits who are not known to him for the first time in court cannot be relied upon in the absence of corroboration by an earlier test identification parade [*Shyamlal Pradhan v State of Orissa* 1996 Cri LJ 1019, 1020 (Ori); *Kanan v State of Kerala* A 1979 SC 1127] …

The very fact that all the witnesses even without any margin of error had identified the suspects as culprits, creates a lurking suspicion in the mind of the court as to whether the identifying witnesses took a clue in identifying the suspects put up in the parade with the fetters on their legs. [*Tahir Mohammad v State of Madhya Pradesh*, A 1993 SC 931, 934; 1993 Cri LJ 193]…" When the accused was brought under custody warrant to jail where TI parade was held, the possibility of prosecuting agency showing him to the identifying witnesses was unbelievable [*Ramesh Chandra Lenka v State of Orissa*, 1995 Cri LJ 3178, 3179 (Ori)]. Identification parade is necessary whenever the accused is not identified by the witnesses … .

… the purpose of identification is to test that evidence and the safe rule is that the sworn testimony of witness in court as to the identity of the accused who are strangers to the witnesses, generally speaking, requires corroboration which should be in the form of an earlier identification proceeding….. The exception to this rule of corroboration by an earlier identification is where the court can safely rely on it without previous identification [*S v Maheswar*, A 1964 Or 37]… .

… If a witness did not know the accused before the occurrence and no proper and fair identification parade is held after the necessary precaution and safeguards are taken, test identification parade was held to test his power of identification and the witness was also shown the accused by the police before he identified the accused at the identification parade and later in Court, his evidence becomes absolutely valueless on the question of identification [see *Mohanlal Gangaram Gehori v State of Maharashtra*, A 1982 SC 839, 842; 1982 Cri LJ 630 (2), *Hari Nath v State of UP*, A 1988 SC 345, 348; 1988 Cri LJ 442]. If there are infirmities in the evidence of eye-witnesses their evidence identifying the accused for the first time in court without a proper and fair identification parade is held after the necessary precaution and safeguards are taken and that the witness will not have an opportunity to see the accused at a police station in handcuff test identification parade is of no avail [see *Mahadeb Ghosh v State*, 1983 Cri LJ 1854, 1858 (Cal) (DB); *Hazrat Ali v State of Assam* 1983 Cri LJ NOC 61 (Gauh); *State of Orissa v Ramesh Chandra Mahapatra* 1983 Cri LJ NOC 191 (Ori); (1983) 56 Cut LT 60]… . In a case of day light robbery, if the witness is not able to give the physical features of the accused, his evidence identifying the accused for the first time in court cannot be relied [*Joginder Singh Jaggi v State* 1990 Cri LJ NOC 30 Delhi]. When there is no evidence as to whether the facial description of the accused was related to the police or the investigating officer, it is absolutely necessary to hold a proper and fair identification parade [see *Yog Raj v State*, 1990 Cri LJ (NOC) 80 (Del); *Radha Bhakta v State* 1984 Cri LJ NOC 22; 1983 Cut LR (Cri) 377 (Ori); *Mohd Abdul Haffeez v The State*, 1984 Cri LJ NOC 75 (AP)].

Value of evidence of identification — In *SC Bahri*'s case (A 1994 SC 2420: 1994 Cri LJ 3271) the Supreme Court observed thus:

It is well settled that substantive evidence of the witness is his evidence in the court but when the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after his arrest is of great importance because it furnishes an assurance that the investigation is proceeding on right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial. From this point of view it is a matter of great importance both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused and that all the necessary precautions and safeguards were effectively taken so that the investigation proceeds on correct lines for punishing the real culprit. It would, in addition, be fair to the witness concerned also who was a stranger to the accused because in that event the chances of his memory fading away are reduced and he is required to identify the alleged culprit at the earliest possible opportunity after the occurrence. It is in adopting this course alone that justice and fair play can be assured both to the accused as well as to the prosecution. But the position may be different when the accused or a culprit who stands trial had been seen not once but for quite a number of times at different point of time and places which fact may do away with the necessity of test identification parade.

The evidence of identity must be thoroughly scrutinised, giving benefit of all doubt to the accused; but if after a thorough scrutiny there appears to be nothing on the record to suspect the testimony of the identification witnesses, the Court ought not to feel shy of basing a conviction on such evidence alone, because of the bare possibility that there could be honest though mistaken identification." [*Rameshkumar Soni v State of Madhya Pradesh*, 1997 Cri LJ 3418 (MP). See *State of MP v Manka*, 1960 MP C216].

In *Asharfi v State*, A 1961 All 153; 1961 (1) Cri LJ 340, the Division Bench of the High Court agreed with the above.

Their Lordships agreed with the above observation made by this Court. After mentioning agreement with the above decision of the Division Bench of this Court it held that 12 questions are apt to arise and must be answered by the Court to its satisfaction before it can accept the evidence. They are as follows:

(1) Did the identifier know the accused from before?

(2) Did he see him between the crime and the test identification?

(3) Was there unnecessary delay in the holding of the test?

(4) Did the magistrate take sufficient precautions to ensure that the test was a fair one?

(5) What was the state of the prevailing light?

(6) What was the condition of the eye-sight of the identifier?

(7) What was the state of his mind?

(8) What opportunity did he have of seeing the offenders?

(9) What were the errors committed by him?

(10) Was there anything outstanding in the features or conduct of the accused which impressed him?

(11) How did the identifier fare at other test identifications held in respect of the same offence?

(12) Was the quantum of identification evidence sufficient?

No hard and fast rule can be laid down and each case has to be dealt with on its own merits. These questions are of universal application. While acting upon the test identification the Court must satisfy itself with the answers of these questions. If the Court comes to the conclusion that answers to these questions do not convey that the result of the test identification is reliable … it cannot be relied upon. On the other hand, if the Court concludes that there is nothing on record to suspect the testimony of identification witnesses the Court can base conviction on the basis of such evidence alone. There is no immutable proposition of law or of practice that it is imperative to hold test identification parade of accused persons who are not known to the witnesses prior to the incident. What weightage should be given to the evidence of identification of witnesses who have identified the accused for the first time in court is a question of fact and no strait jacket formula applicable to all cases can be laid down [*Madhukar Damu Patil v State of Maharashtra*, 1996 Cri LJ 1062, 1065 (Bom)]. The evidence of identification can only be relied upon if all the chances of suspects being shown to the witnesses prior to their test identification are eliminated. *Ram Charan v State of Maharashtra*, 1995 (1) All MR 122.

The prosecution has to adduce link evidence to the effect that right from the arrest till being lodged in jail, the faces of the suspects were kept veiled and no one had opportunity to see them. *Asharfi v State*, A 1961 All 153. Plea that the suspect was shown to the witness does not require to be affirmatively established, it is sufficient if the accused can create a reasonable doubt in the mind of the court. [*Vilas Vasantrao Patil v Choudhry*, 1996 Cri LJ 1854, 1857, 1858 (Bom)]. "Only one identification cannot eliminate the possibility of the painting out being purely through change and for this reason is insufficient to establish the charge" (See *Asharfi v State of UP*, A 1961 All 153; 1961 (1) Cri LJ 340). Where the accused was shown to the witness before the TI parade, the proceeding of T.I. parade and its outcome carry no evidentiary value [State of *MP v Samaylal*, 1994 Cri LJ 3407, 3412 (MP)].

… Value of identification evidence depends on the effectiveness of the precautions taken against the identifying witnesses having an opportunity of seeing the persons to be identified before the parade and also against being provided with any unfair aid or assistance to facilitate identification *[Hasib v S*, A 1972 SC 283]. The proper course for the police to do is to allow the accused to remain in judicial custody till his identification parade is arranged *[Adesh Kumar v State*, (1986) Cri LJ 233, 235; (1985) 28 DLT 126 (Del)]. When the witnesses had no opportunity to see the accused prior to the holding of the test identification parade, their evidence can be accepted [*Kalipado Gope v State of Bihar*, 1987 Cri LJ 1320; 1987 BLJ 285 (Pat)). Value of identification parade depends on the effectiveness and the precautions taken against the identifying witness having an opportunity of seeing the persons to be identified before they are paraded with others and also against the identifying witness being provided by the investigating authority with other unfair aid or assistance so as to facilitate the identification of the accused concerned [*Bollavaram Pedda Narsi Reddy v State of AP*, 1991 Cri LJ 1833, 1837 (SC)]… .

Manner of holding TI parade — If the manner of holding identification parade throws suspicion on police, the evidence is not entitled to any weight [*Bhandari v R*, A 1940 L 281]… .

There should at least be ten under-trials for each suspect. The proportion of one to five cannot be regarded as satisfactory [*R v Chhadammi*, A 1936 A 373; see however *S v Wahid*, A 1953 A 314; *Dalchand v S*, A 1953 A 123], and of less than

3 to 1 is of little value [*Ram Singh v R*, A 1943 0 269]. The proper way is to put up each suspect separately for identification mixed with, in any case, not 1ess than nine or ten. Less than that number considerably diminishes the value of identification [*Anwar v S*, A 1961 A 50]. When the accused had brown eyes and persons with such brown eyes had not been mixed in the parade the evidence of identification had to be rejected [*Chander v S*, A 1973 SC 1200]. When the accused, a bearded man, with a tape on his neck waited with the witnesses outside the magistrate's court and among five other persons in the parade none was similarly bearded the evidence had to be rejected [*Yeshwant v S*, A 1973 SC 337]. Where persons between 18 and 26 were paraded with the accused about 16 years old, and the identifying witnesses were waiting outside the thana when the persons were called in for the identification parade and the identifying witnesses identified the accused, the identification was unfair [*Gobardhan v R*, A 1932 L 308] … .

In criminal cases certain precautions should be observed: "The witness should not, however, be asked to identify a person for the first time when he is in the dock; the accused should previously be placed with other persons and the witness asked to pick him out [*R v Cartwright*, 1914, 10 Cr App R 219]; nor should the witness be asked to identify a prisoner when the prisoner is alone in a room [*R v Williams*, 1912, 8 Cr App R 84], nor should the witness be asked, "Is that the man?" [*R v Chapman*, 1911, 7 Cr App R 53]; nor allowed to see the prisoner before an identification parade [*R v Dickman*, 1910, 5 Cr App R 143]; nor should the suspected person be described to the witness [*R v Bundy*, 1910, 5 Cr App R 270; Hals, 3rd Ed Vol 10, para 814]. For precaution for concealing the identity of accused prior to parade; see *S v Ranjita*, A 1962 Raj 78 FB; *Palaniaswami v S*, A1968 B 127. When the witnesses were asked to wait outside the court at the time the accused were brought to the court for the test identification parade it is quite probable for, the witnesses to have seen the accused before the parade and so the evidence of identification is valueless [*Ghanashyam Das v The State*, 1984 Cri LJ 588, 591; (1984) 1 Crimes 845 (Ori)]. If before the identification parade is held, the accused was taken to the court from the jail a number of times and the witnesses had an opportunity of seeing the accused to be identified, it is enough to vitiate the identification parade [*Govinda Pradhan v State*, 1991 Cri LJ 269, 272 (Ori); *State v Pravakar Behera*, 1991 Cri LJ 745, 746 (Ori); *Bhullen v State*, 1981 Cri LJ NOC 93 (All); 1981 All Cri R 208; *Md Rosan v The State*, 1984 Cri LJ NOC 85; (1984) 1 Crimes 838 (Ori)) … .

Where there was clear evidence to show that the accused persons were shown to the witnesses, the identification of such accused by the witnesses in the Court was held to be meaningless [*Shaikh Umar Ahmed Shaikh v State of Maharashtra*, 1998 Cri LJ 2534 (SC)].

Where there was vas no other evidence against the accused except identification, the court said that there is need for caution in a case where the evidence depended solely on identification evidence. The judge also noted the danger of relying on dock (in court) identification in the light of the failure of the prosecution in holding TI parade. The case arose out of robbery and murder in a bus. The identifying witnesses were policemen on duty [*Williams v R*, (1997) 1 WLR 548 (PC)].

For effect of breach of procedural requirements in conducting identification parade, see *Thirumalai Kumar v Public Prosecutor* [1997] 3 SLR 434 (Singapore HC).

IDENTIFICATION OF FIRST ACCUSED

[13] On considering the evidence of PW6 that he had identified the male Indian whom he had earlier seen in handcuff at the police station prior to

identifying him at the identification parade when tested with the evidence of the investigating officer (PW12) that PW6 could possibly have seen the first accused prior to the identification parade would no doubt lead to the irresistible inference that the male Indian whom PW6 had identified at the identification parade was the person who was in handcuff, shown to him by PW7 and seen by PW6 just before the identification parade and which turned out to be the first accused. This inference is on a firmer ground when considering the evidence of PW6 who himself has stated that PW7 had informed him at the police station that an arrest has been made regarding the incident and instructed him to see the male person who was arrested. PW6 has also testified that the person who was arrested was handcuffed and he was outside the police station at a different place. PW6 has further testified that he was told by PW7 to identify the person who was arrested. He then identified at the identification parade the person who was handcuffed and whom he had earlier been shown by PW7. On this ground alone, it is the respectful view of this court that the identification of the first accused at the identification parade was superfluous and is of no practical or evidential value as it goes against the rule and the whole purpose of having an identification parade which no doubt should be independent and fair in the true sense of it.

[14] There is also another unsatisfactory feature in this case. The first accused was 21 years old at the time of the offence and the participants in the identification parade were of ages being, 18, 19, 29, 30, 32 and 33. There is also no evidence to show whether the participants in all the three identification parades conducted by PW7 were the same set of participants or was there different set of participants placed in the three sets of identification parade. There is no evidence where PW6 was placed during the interval where the second and third identification parades were arranged. In the instant case, it is interesting to note that PW6 has stated in no uncertain terms that he was asked by *PW7 to identify the person who assaulted the deceased.* There was no evidence that PW6 was asked by PW7 to identify the person who was present at the scene of the incident or the person who had strangled PW6. If PW7 had requested PW6 *to identify the person who assaulted the deceased at the identification parade* which was held on 22 January 2002 and PW6 had identified the first accused on 22 January 2002 at the identification parade as the person who assaulted the deceased, then the whole of the prosecution case would crumble because PW6 has testified in court that the persons who assaulted the deceased were not in court and he had identified the first accused in court as the person who had strangled him and he is not the person who assaulted the deceased. It is regrettable that this court has to highlight this obvious flaw in the prosecution case where it ought to have been raised by the defence counsel for the first accused during his submission. Infact PW6 has stated that both the accused persons did not inflict the injury on the deceased and it was the other two persons who had come much earlier on a m/cycle who had assaulted the deceased. In any event, His Lordship Edgar Joseph Jr FCJ in *Kiew Foo Mui & Ors v PP* [1995] 3 MLJ 505 at p 511 observed:-

In our view, the learned judge remained under such a duty since it is not just of some importance, but of fundamental importance to the administration of criminal justice, that an accused person should feel that he has not been deprived of that priceless asset — namely a fair trial, *notwithstanding the shortcomings of his counsel. It is axiomatic that the primary duty of a judge at any trial — whether criminal or civil — is to ensure that justice is done, no doubt, according to law.*

(Emphasis by this court)

[15] This court finds that the prosecution case contains grave doubt as to the identification of the first accused when viewed in its totality to the extent that the evidence of PW6 cannot be relied on to link the first accused with the murder of the deceased because, *first*, PW6 was asked to identify the person who had assaulted the deceased and he had identified the first accused as the person who had assaulted the deceased at the identification parade, *secondly*, PW6 has testified that the first accused was not the person who had assaulted the deceased, *thirdly*, PW6 was shown the first accused by PW7 at the police station prior to the identification parade as the person who was arrested in respect of the alleged murder and *fourthly*, PW6 had identified the first accused at the identification parade as he was asked to identify the person who was shown to him by PW7 prior to the identification parade that is, the person who was arrested and handcuffed. Consequently, the entire process of the identification parade is found to be most unsatisfactory, irregular and improper. Further more the investigating officer, (PW12) has testified that his investigation has revealed that the first accused was with his family on 13 January 2002 between early in the morning till 11.30am at Batu Gajah for a religious festival known as 'Ponggal' and that there was a witness namely, Nalini who was with the first accused. PW12 has also admitted that he had recorded a statement from the said witness and his reason for so doing was to confirm the position of the first accused. PW12 has further testified that his investigation disclosed that the first accused was at Ulu Piah later at 2pm for recreation at the waterfall on 13 January 2002 whereas the deceased was alleged to have been murdered between 11 to 12 noon. All this evidence from the prosecution's own witnesses tends to show, *first*, the first accused was not the person who assaulted the deceased, *secondly*, it is not likely that the first accused was at the scene of the crime between 11 to 12 noon and *thirdly*, there is no evidence that PW6 was asked by PW7 to identify at the identification parade the person who had strangled him because according to PW6, he was asked by PW7 to identify the person who had assaulted the deceased. If this evidence is taken in its proper context, PW6 must have identified the first accused as the assailant of the deceased and not the person who strangled him or who was at the scene of the crime. The prosecution must accept the blame for this material gap and discrepancy as to who PW6 was asked to identify and who he had in fact identified at the identification parade.

[16] Further, this court finds that the prosecution did not eliminate the possibility that the male Indian who was handcuffed and shown by PW7 to Yau Kim Pong (PW6) on 22 January 2002 prior to identifying the first accused at the identification parade on the same day was not the first accused. There

was also an admission by the Investigating Officer (PW12) when re-examined by the learned DPP that PW6 could possibly have seen the first accused prior to proceeding to the identification parade. This court is of the view that the evidence of PW12 read together with the evidence of PW6 is no doubt fatal to the prosecution as since PW6 had seen the first accused in handcuff prior to identifying him at the identification parade on the same day and at about the same time. In the circumstances, the identification of the first accused at the identification parade and his subsequent identification of the accused at the dock at the trial is absolutely valueless and does not come anywhere near to a positive identification of the first accused. In fact, the learned DPP with respect had the opportunity to seek clarification from PW7 during re-examination whether the male Indian who was handcuffed and seen by PW6 prior to the identification parade on 22 January 2002 was in fact the first accused or someone else but this was not clarified and left open and neither did the learned DPP concede to this unsatisfactory manner in which PW6 was asked to identify the first accused at the identification parade. Infact, the evidence of PW6 on this aspect of the case as follows:-

> Insp Koay ada memberitahu saya satu tangkapan telah dibuat mengenai kejadian ini. *Insp Koay ada suruh saya tengok lelaki yang ditangkap. Pada masa itu orang yang ditangkap ada digari.* Orang yang digari itu berada di luar Balai Polis iaitu tempat yang lain. *Saya disuruh oleh Insp Koay untuk mengecamkan lelaki yang ditangkap. Lepas saya camkan orang yang digari*, saya dibawa ke Balai Polis untuk 2 kali lagi.

[17] Generally, an identification parade is held where there is some doubt as to the identity of the person who is alleged to have committed the offence with which he is charged or where the accused persons are not previously known to the victim. (See *Maidin Pitchay & Anor v PP* [1968] 1 MLJ 82 at pp 84–85; *PP v Sarjeet Singh & Anor* [1994] 2 MLJ 290 at pp 294–295; *Mehtab Singh & Ors v State of Madhya Pradesh* 1975 SC 274 at p 277; *Kanan & Ors v State of Kerala* AIR 1979 SC 1127; *Arumugam s/o Muthusamy v PP* [1998] 3 MLJ 73 and *Jaafar bin Ali v PP* [1998] 4 MLJ 406).

[18] As to the conduct of holding identification parade, it is settled practice for the police to parade not less than nine to ten persons of similar height, built and ages and the same nationality of the suspect to identify a suspect. Following this practice, there must be no prompting or suggestion on the part of the police to the witness as to the identity of the suspect. It must also be conducted in such a manner that the witness will have no opportunity even to have a glimpse of the suspect that he have to identified and placed in the parade (see *R v Dickman* [1910] 74 JP 449, *R v Bundy* 5 Cr App R 272).

[19] It requires no reminder for the investigation agency that the purpose of an identification parade is to enable a victim or an eyewitness to identify the wrong doer and for that purpose it should be conducted in such a professional and independent fashion that it would not lead to any suspicion or cast any doubt that the suspect who was put up in the identification parade was picked up or identified by the witness only because he had the opportunity to see the suspect at the police station on the same day or at about the time before the witness proceeded to identify the suspect at the identification parade. Therefore, the identification parade is no doubt a very

important part of the investigation for the court to determine the credibility of the witnesses on the point of identification. (See *Awadh Singh v The State* 1954 AIR Patna 483 (Vol 41, CN 166) and *Provash Kumar Bose v The King* AIR 1951 Cal 475).

[20] Police officers who are in charge of identification parade must take all necessary precautions and safeguards to ensure that the witness who would be called to identify a suspect at an identification parade did not have any opportunity to see or even have a glance of the suspect prior to the identification parade. Police officers must ensure that this procedure is carried out under the fairest and independent circumstances as the pre trial identification of a suspect is an important factor in assessing the credibility of the witness on the issue of identification so as to consider if he could be linked to the crime especially where the suspect is a complete stranger and who is not previously known to the witness or victim. This is of crucial importance not only in cases where the suspect and the witness are complete strangers and not known to each other but in situation where the witness had only a little opportunity or under difficult circumstances to have a view of the suspect at the place of crime. In *Balwant Singh v PP* (1960) 26 MLJ 264, *Rigby J* held that:-

> It was wholly improper for a police officer to invite the complainant to inspect the persons at the identification parade and ask her to point out the person who had raped her.
>
> At most he should, of course, have indicated to her that there might be present on the parade the person whom she alleged to have raped her.

[21] In *John James Haslam* [1925] Crim App Rep 59, a distinction was drawn between a situation of showing a photograph to a witness of a person to assist in the arrest of a wrongdoer not yet arrested and a situation of showing a photograph to a witness who was called on to pick out a person at an identification parade as being the wrongdoer. In the former situation no criticism is to be made upon the conduct of the police in the showing of photograph to those persons who afterwards became witnesses as the police might obtain a clue to the direction in which investigation might be carried out or for the purpose of an arrest whereas in the latter situation a witness who has seen a photograph of a suspect who has already been arrested may pick out the suspect at an identification parade as a wrongdoer simply because he has seen a photograph of him. *Hewart LCJ* observed:-

> Two matters emerge clearly in this appeal. First, witnesses who were called on to pick out the appellant at an identification parade as being the wrongdoer had previously been shown a photograph of him. It is not suggested that the photographs were shown to the witnesses that the police might obtain a clue to the direction in which enquiries might usefully be made, or to the person whom it would be proper to arrest. The appellant had already been arrested, and the effect of what was done was to give the witnesses — or certainly three of them — an opportunity of studying a photograph of the appellant before they were called on to identify him. That course is indefensible. It cannot be right that when a witness, or a possible witness, is being called on merely to identify a person who is already arrested, that witness, before the identification, should be shown a photograph of

the accused person. One can see that sometimes it will happen that when a person has been shown a photograph to assist in the arrest of a wrongdoer not yet arrested he may later give evidence of identification. That is a different thing from what happened here. In that case the person is asked to identify the accused person, notwithstanding the fact that he has previously seen a photograph. *A person who has seen a photograph of the accused person may identify him simply because he has seen a photograph of him.*

(Emphasis by this court)

[22] In *Chooi Kam Woh v Regina* (1954) 20 MLJ 264, cases that were referred to, namely *R v Dickman* 5 CR App Rep 135 and *R v Chapman* 7 CR App Rep 53. In *R v Dickman* 5 CR App Rep 135 at p 143, it was stated:-

The police ought not, either directly or indirectly, do anything which might prevent the identification being absolutely independent, and they should be most scrupulous in seeing that it is so.

(Emphasis by this court)

[23] In *R v Chapman* 7 CR App Rep 53 at p 56, the Lord Chief Justice said:-

The usual and proper way in such cases is to place the suspected man with a sufficient number of others, and to *have the identifying person pick out a man without assistance.*

(Emphasis by this court)

[24] In *Chan Sin v PP* (1949) 15 MLJ 106, the Court of Appeal through Willan CJ observed that:-

We would further point out that in this country it has always been the practice in Police Identification Parades *that all the persons on the Parade should be of the same nationality as that of the suspected person, as far as possible they should be from the same station in life as that of the suspected person; and also there should be no great disparity of ages in the persons on the Parade.*

(Emphasis by this court)

[25] *Archbold* 43 Ed at para 14–2 p 10303 have summarized the *Turnbull* guidelines to determine the circumstances when "identity" has been an issue which is as follows:-

First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleged to be mistaken, the judge should warn himself of the special need for caution before convicting in reliance on the correctness of the identification.

Secondly, the judge should examine closely the circumstances in which identification came to be made. Such questions as: how long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance are important factors to be considered.

Thirdly, the judge should remind himself of any specific weakness which had appeared in the identification evidence.

DOCK IDENTIFICATION

[26] In view of the infirmities, impropriety and flaws as found by this court and the unprofessional and unfair course taken by the investigation agency in the conduct of the pre-trial identification parade of the first accused, the subsequent identification in the dock of the first accused on 31 July 2003 about 1 year 6 months later could not be relied on and is most unsafe to accept as good identification or of good quality. Consequently, this court finds that the identification parade to be most unsatisfactory, irregular, unreliable and most improper for the reasons advanced above and that the subsequent identification of the first accused in the dock is of no evidentiary value especially where PW6 had also seen both the accuseds being brought in to the court for this case before the dock identification. It is also improper to identity a suspect for the first time only when he is in the dock where he is a complete stranger to the witness (see *R v Cartwright* (1914) 10 Cr App R 219; *Arumugam s/o Muthusamy v PP* [1998] 3 MLJ 73 and *Jaafar bin Ali v PP* [1998] 4 MLJ 406).

IDENTIFICATION OF THE SECOND ACCUSED

[27] As for the *second accused*, there is also grave doubt created by the evidence of PW6 himself that he had identified the second accused at the first identification parade. PW6's evidence have to be rejected because the arresting officer (PW10) and the investigating officer (PW12) have both testified that the second accused was arrested only on 25 January 2002. If the second accused was arrested on 25 January 2002, it was impossible for PW6 to have identified the second accused at the first identification parade which was held on 22 January 2002. This court is of the view that there is certainly a mistaken identity of the second accused because first, there is no evidence from PW8 or PW12 that the second accused was one of the participants in the identification parade which was held on 22 January 2002 and secondly, it could not have been possible for PW6 to identify the second accused at the first identification parade as the second accused was arrested only on 25 January 2002. The most disturbing thing is that the learned DPP had failed to seek clarification from PW6 as to who was this person he had referred to as the second accused whom he had identified at the first identification parade which was held on 22 January 2002.

[28] However, during submissions, this mistaken identification of the second accused was raised by his counsel. In reply, the learned DPP had the audacity to submit that PW6's evidence that he had identified the second accused at the first identification parade was a minor matter. This court cannot by all imagination accept this reply to have come from a DPP that it was minor matter and with respect ought to be rejected outright. The learned DPP had in fact failed to re examine PW6 on this discrepancy and the evidence was left open for attack and rightfully by the defence and which has formed a strong basis for this court to give the benefit of doubt in favour of the second accused. In fact, the learned DPP had failed to take advantage

of the opportunity accorded to the prosecution to re-examine its own witness if it is found that there is ambiguity or discrepancy in the testimony or suspicion cast on PW6's evidence on the identification of the second accused at the first identification parade held on 22 January 2002 which had emerged during cross-examination. The object of re-examination is to give an opportunity to the party affected in the instant case, the prosecution to reconcile the material discrepancies if there was any between the evidence given in evidence-in-chief and the cross-examination or to enable this witness to explain his evidence if it was inadvertently said in cross-examination or with the view to remove any ambiguity in the testimony or suspicion cast on the evidence by the cross-examination. (See *Sarkar on Evidence* 15th Ed 1999 Vol 2 pp 2193–2194) and followed in *Mohd Samsudin bin Ismail v Tan Yeow Hwa & Anor* [2000] 3 AMR 3445 at p 3467. See also *PP v Lee Pak* (1937) 6 MLJ 265 at p 266) This court is unable to appreciate how the learned DPP could submit that it was a minor matter where the threshold of the prosecution case is depended on the identification by PW6 where both the accuseds have challenged that they were not at the scene at the time of the incident.

[29] There is another unsatisfactory feature in the instant case where according to ASP Ang Ah Ban (PW8), the *clothings of the second accused* was dirty when compared to the clothings worn by the other participants in the identification parade which could mean that the second accused who was placed in the identification parade was easily distinguishable and stood apart from the other participants. This was most unfair to the second accused as he could be easily singled out. The unsatisfactory manner in which the identification parade was conducted would no doubt enable PW6 an easy opportunity to single out the accused without any independent mind and instead point out to the second accused.

[30] Be that as it may, in the instant case, there are also other unsatisfactory features. There is no admissible evidence as to who chose the participants for the identification parade, whether it was the officer who conducted the identification parade (PW8) in which case there is no evidence that he had seen the second accused before the selecting process of the participants were carried out in terms of similarity in height, complexion and age or whether the selecting process was carried out by someone else. In fact, PW8 has stated that the height of the participants in the identification parade were between 5 ft to 5.5 ft and 5 ft to 5.9 ft whereas both the learned DPP and counsels have agreed in court that the height of the second accused is about 5 ft to 5.3 ft. This again shows that the participants who were placed with the second accused at the identification parade were not persons of similar in height as the second accused and there was glaring disparity in the height and the appearance when compared to the second accused. Further, PW6 had testified that the Indians who came to the durian plantation were of dark complexion and in the instant case, there is no evidence whether all the participants in both the identification parades were of dark complexion.

[31] It could be deduced from the cases referred to above that the police officer who conducts an identification parade or the officer who is assigned

to look for participants to be placed in the identification parade before an identification parade is held ought to know and should have seen the persons arrested or the suspect in order to ensure that the persons who are placed in the identification parade are as far as possible from the same station in life of the suspected person and that there be no great disparity of ages and height of the persons who are placed on the parade when compared to the suspect. In the instant case, there is no evidence adduced by the prosecution that both PW7 and PW8 had ever seen both the accuseds prior to the identification parade.

[32] In *R v Osborne, R v Virtue* [1973] 1 All ER 649 at p 657, Lawton LJ for the Court of Appeal observed:-

> The whole object of identity parades is for the protection of the suspect, and what happens at those parades is highly relevant to the establishment of the truth … .
>
> (Emphasis by this court)

IDENTIFICATION OF CLOTHINGS

[33] This court finds that the manner in *which the clothings purported* to have been worn by both the accused persons and shown to PW6 was most unsatisfactory, improper, unfair and irregular for the following reasons:-

(a) There was no precise description or features of the clothings given by PW6 to PW12. In fact the investigating officer (PW12) has testified that the description of the attackers and the clothings and its colours which were given to him by PW6 was not clear. In the circumstances, how could PW12 in the presence of PW6 then place a particular set of clothings and at the same time ask him if those were the clothings worn by the accused persons. In fact the evidence of PW12 is as follows:-

> SP6 tidak memberi deskripsi yang jelas tentang suspek yang menyerang SP6 dan juga beliau tidak beri dengan jelas pakaian suspek seperti warna. Pada 21 Januari 2002, saya ada temu bual SP6 di pejabat saya. Saya tunjukkan kepada SP6 dua pasang baju dan dicamkan oleh SP6 walaupun SP6 sebelum 21 Januari 2002 tidak memberitahu satu warna pakaian dan identiti suspek … .

(b) the proper method of identifying clothings worn by a suspect and which were recovered by the police was to place several clothings of similarity in colour, size, make and material and the description of the clothings must have been related by the witness to the investigating officer prior to showing him a particular set of clothings. In the instant case, it is most improper for PW12 to have shown one particular type of clothings to PW6 and at the same time to have asked him if this were the clothings worn by the suspect especially when PW12 had admitted that PW6 did not give any clear description of the clothings and colour of the suspect (see *Udai Lal v State of Rajasthan* 1994 Cri LJ 509 (Raj));

(c) mere identification of the accused on the strength of the clothings and purported to have been worn by the accused on the date of the incident and later recovered from the accused and shown to PW6 is not sufficient identification of the accused by PW6 unless there is supporting evidence

to link the accused with the crime (see *Husein Juna Dafar v State of Gujarat* [1986] 3 Crimes 229 (Guj) (DB)); A

(d) where the clothings shown to the witness are of ordinary type as in the instant case and is easily available in the market and in this case since PW6 did not point out to any special features or marks of identification of the clothings worn by the accused party, no evidentiary value can be attached to the PW6's testimony as to the identification of the clothings (see *State v Wahid Bux* AIR 1953 All 314). B

[34] This court is of the view that the clothings that were shown to PW6 by PW12 was carried out in a most unfair and irregular method and the identification by PW6 of the clothings as worn by the accused is therefore not sufficient to link the accused. In fact the clothings recovered from the accused should have been placed together with several trousers and T-shirts similar in colour and then PW6 should have been asked to pick out among the several clothings that was worn by the first accused who was supposed to have been at the scene of the crime. If this method of identification was properly carried out, this court may be able to consider if there was any nexus to the first accused as to his presence at the scene of the crime and if he may possibly be the one who had strangled PW6 although this piece of evidence may not necessarily implicate the first accused to the murder of the deceased. C D

[35] In *PP v Amar Singh* (1948–49) MLJ Supp 55, the accused was charged with two others unknown in order to the committing of extortion attempted to put the victim in the fear of a certain injury, to wit, death and thereby committed an offence punishable under s 387 of the Penal Code. In that case, the victim had known the accused about 5 years before the date of incident and had met him several times. *He recognised the accused from his face and voice*. The victim's evidence as to the identity of the accused was corroborated by his wife who had also seen the accused near her house before the date of incident several times and on one occasion had spoken to him. In that case no identification parade was held because the victim and the wife had recognised the accused by his face and voice and had known and seen him several times prior to the date of incident. However, *His Lordship Storr J* held that the usual and proper way in such cases would have been to hold a proper identification parade. In other words, despite the fact that the victim was able to *recognise* the accused because he had known the accused for about 5 years and had met him several times prior to the date of incident, it was held that an identification parade ought to have been held to identify the accused. Basically, that case tends to show the significance and importance of holding a proper identification parade which process no doubt has to be conducted in the most fairest and independent circumstances so as to ensure that an innocent person is not identified or picked out as the assailant. E F G H

[36] In *Chooi Kam Woh v Regina* (1954) 20 MLJ 264, the conviction against the appellant for an offence of theft was quashed by *Murray-Aynsley CJ* as the detective who had picked out the appellant from 200 photographs shown to him before the arrest had subsequently identified the appellant. This case in fact tends to show that a witness who picks up a suspect at an I

identification parade should not have the opportunity to see the suspect just before the witness is taken to the identification parade.

[37] An accused's fate and guilt cannot be allowed to be determined solely on a pre trial identification rendered by a witness where that identification relied on by the prosecution smacks of impropriety and irregularity. In the circumstances, any subsequent dock identification in court by the same witness, in the instant case, the identification of the second accused by PW6 whose identification at the identification parade is found to be unsafe has little evidential value unless there is some other independent corroboration to implicate the second accused. In *PP v Mohamed bin Majed* [1977] 1 MLJ 121, the accused was charged with rape. The victim did not describe the assailant to anyone immediately after the incident or even at the time when she made the police report or even to PW6 a family friend of the victim who acted as an Interpreter at the police station when she lodged the report. The victim was also not able to identify the accused apart from saying that he was the one who raped her by any other way, a mark on his body or some other peculiar feature about his face or even the colour and type of his clothes. At the identification parade, the accused was found to be an odd person when compared to other participants who were of lighter skin than the accused whose complexion was very dark. As the identification parade was conducted in such an unsatisfactory and flawed manner so as to cause prejudice to the accused, *His Lordship Harun J (as he then was)* held that the subsequent identification of the accused in court by the victim was of little significance.

[38] In *Low Thim Fatt v PP* [1989] 1 MLJ 304, the appellant was convicted with three offences of robbery under Sections 392 and 397 of the Penal Code and sentenced to 10 years imprisonment on each charge and ordered 5 strokes of whipping on each charge. He appealed against both the conviction and sentence. The appellant's *main ground of appeal was that the identification parade where PW2 had identified the appellant was irregular because PW2 was requested by the police to peep through the glass in the door to see the appellant before she attended the identification parade. Zakaria Yatim J (as he then was)* observed:-

> In my opinion the identification of the appellant at the identification parade after PW2 was asked to peep through the door to confirm that it was the appellant who pointed the gun at her, was highly irregular. *PW2 should be prevented from seeing the appellant before he was paraded with the other persons: see Sarkar on Evidence, 13th Ed, p 102. Since PW2 had the opportunity to see the appellant beforehand, the evidence of her subsequent identification at the parade was vitiated: Chang Kim Siong v PP.* PW2's evidence on the identification of the appellant could not therefore be taken into consideration."
>
> (Emphasis by this court)

[39] However, it is to be noted that in that case, the appeal against conviction was dismissed because there were other witnesses, namely PW3 and PW8 who did not see the appellant at the police station before the identification parade but had however made a positive identification of the appellant at the identification parade and in court and the identification parade was found to be properly conducted.

[40] In *PP v Chan Han Choon & Ors* [1989] 2 MLJ 427 at p 431, Faiza Tamby Chik JC (as he then was) said:-

> These conflicting pieces of evidence given by two important and vital prosecution witnesses, ie the investigating officer, PW16, and PW9, the officer who conducted the identification parade, were specific weaknesses in the identification evidence for the prosecution showing the quality of the identification evidence — the poorer the quality the greater the danger.
>
> Moreover, *the identification parade was not properly conducted*. The proper way was to put up each suspect separately for identification purpose with not less than nine or ten persons (see Sarkar, 13th Ed, p 99).
>
> (Emphasis by this court)

[41] In *Jaafar bin Ali v PP* [1998] 4 MLJ 406, the identification of the accused was the main complaint at the appeal ie *PW5 did not give any description of the accused to the police or any other person and it was contended that the identification parade which was conducted by the police was defective as the accused had been shown to PW5 prior to the holding of the parade.* On appeal, the conviction and sentence of the offence of attempted murder under Section 307 of the Penal Code was quashed. In that case, PW5 was shown the accused two days before she attended an identification parade at the Melaka Police Headquarters where she identified the accused through a one way mirror. The police had also shown PW5 a photograph of the accused in her house after the identification parade in order to enable her to identify the accused correctly where she had subsequently identified the accused in court. Augustine Paul J (now JCA) said:-

> *The quality of the identification evidence that is required includes a description of the accused that the identifying witness must have given to the police*. The need for such description is implicit in *Turnbull* itself and has been stressed in cases such as *R v Atfield* (1983) 25 Alta LR (2d) 97; *R v Power* (1987) 67 Nfld & PEIR 272 and *PP v Amar Singh* [1948–49] MLJ Supp 55. In my opinion, *it is necessary for an identifying witness to give a description of the accused especially in cases where the accused was not known to the witness prior to the incident. It may not be necessary where there is other supporting evidence on the identification of the accused and when the accused is well known to the witness*. The object of a description of the accused is explained by Deutscher and Leonoff in their book entitled *Identification Evidence* in the following words at pp 111–112:
>
> This preserves the original memory in as accurate a form as possible. *The original description can then be cross-checked with the description given by other witnesses, with the actual appearance of the accused, and with the description given at trial.* Variations between the original description and that given at trial may be as a result of the numerous psychological factors that tend to distort memory over time.
>
> There have been many cases of wrongful convictions based on mistaken eyewitness identification. *It has been held that evidence as to identity based on personal impressions, however bona fide, is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts, an unsafe basis for the verdict* (see *R v McDonald*). Thus, *it has long been recognized that witnesses should be asked to identify a suspect or an accused at the earliest opportunity and under the fairest of circumstances* (see *R v Cartwright* (1914) 10 Cr App Rep 219; *Davies v The King* (1937) 57 CLR 170; *R v Browne and Angus* (1951) 99 1 WWR 449). Evidence

given by a witness identifying an accused as the person whom he saw at the scene of the crime or in circumstances connected with the crime will generally be of very little value if the witness has not seen the accused since the events in question and is asked to identify him for the first time in the dock, at least when the witness has not, by reason of previous knowledge or association, become familiar with the appearance of the accused. Gibbs CJ, having said that in *Alexander v The Queen* (1981) 145 CUR 395 added at p 400:

> However, as a matter of legal principle, it seems to me impossible to say that the admissibility of evidence of a prior act of identification depends on the fact that an identification parade was held.

Chong Siew Fai CJ (Sabah & Sarawak) in speaking for the Federal Court in *Arumugam s/o Muthusamy v PP* [1998] 3 MLJ 73 said at p 75:

> Generally speaking, however, a dock identification in the sense as described above, ie identification of an accused for the first time in court at the trial, is undesirable, and it would be a good practice to hold an identification parade, which, if it turns out to be positive, would tend to strengthen the case for the prosecution. But to hold that an identification parade must, in all circumstances, be conducted in order to sustain a conviction would be too stringent. There may well be situations where an identification parade cannot or need not be held, for example, where the attendance of the witness at the parade is physically impossible or impracticable or there are exceptional circumstances.

On the instances when an identification parade is required, *Andrews & Hirst* said this at p 321:

> It is necessary to distinguish between cases in which the accuracy of a purported identification is in issue, and cases in which the only issue is whether identifying witnesses are lying. In the former kind of case, much will turn upon the reliability or pre-trial identification, and a failure to follow proper procedures in respect of such identification may well lead to the court or judge excluding the evidence concerning it. It will also be essential, in most cases, for the judge to direct the jury on the dangers of mistaken identification, in accordance with the procedures prescribed by the Court of Appeal in *R v Turnbull* [1976] 3 All ER 549.

A further defect in the identification evidence is that the police did not get a description of the accused from PW5 prior to his dock identification. On this issue, the learned sessions court judge said:

> The fact that the victim did not give a description of her attacker to the police did not mean that she could not remember the face of the attacker. How could she forget. Her mind would have been playing back the vicious attack repeatedly.
>
> … The point is she had ample opportunity to mark the face and features of the accused. It is quite natural that her impression had become quite vividly sketched on her mind and she was able to identify the accused subsequently.

This finding is not based on the evidence adduced but on mere speculation. In any event, the view expressed by the learned sessions court judge overlooks the fundamental object of obtaining a description of the accused from the witness which is to cross check the subsequent identification of the accused with the description. This will assist in eliminating an objection based on mistaken identification. The absence of a pre-trial description of the accused will reduce the value of identification in an identification parade and subsequent identification in court. There can be no dispute that a description given will enhance

the value of such evidence. It is my view that the learned sessions court judge has discounted the lack of description of the accused by PW5 on wrong principles. In my opinion, the absence of such description is prejudicial to the prosecution on the facts of this case as the accused was not known to PW5 prior to the incident. I interpolate to add that the description of the accused given by PW5 at the trial has no value.

(Emphasis by this court)

The identification parade conducted by PW16 has absolutely no weight as PW5 had seen the accused at an earlier occasion in the police station. On the vitiating effect of identification parade evidence where the witness had the opportunity to see the accused at an earlier occasion, see cases such as *Chang Kim Siong v PP* [1968] 1 MLJ 36; *Lai Ah Kam & Anor v R* [1939] MLJ 306 and *Chooi Kam Woh v R* [1954] MLJ 264. The earlier identification amounts to what is referred to as a 'confrontation'. It refers to any situation where an accused was singled out to a witness as in this case where the accused was literally shown to PW5. The evidence obtained from such a procedure has no value (see *R v Smith and Evans* (1908) 1 Cr App Rep 203; *R v Chapman* (1911) 7 Cr App Rep 53; *R v Keane* (1977) 65 Cr App Rep 247). Even the assessment of the identification evidence of PW5 by the learned sessions court judge is defective. He made an attempt to analyse her evidence in some detail. However, his finding that PW5 had the accused '... under observation for at least 30 minutes' weakens his analysis. *In her own testimony, PW5 said that, she saw the accused's face for only about five to ten minutes. Prior to that, she was riding pillion on his motor cycle. Subsequent to that she was undergoing the trauma of being strangled.* To say therefore that she had the accused 'under observation' for the whole period she was with him shows a mis-appreciation of the facts of the case.

(Emphasis by this court)

Thus the only proper identification that PW5 made of the accused was when he was in the dock. This method of identification would have value only if the quality of the identification of the accused by PW5 at the time of the commission of the offence was good. *PW5 saw the accused only for about five to ten minutes. During that time she was shown pictures of women in bikinis followed by the attempt to strangulate her. The fact that there were bruises around her eyes shows that PW5 could not have observed the accused well at that time. It cannot therefore be said that PW5 had the accused 'under observation' even for the full period that the accused had removed his crash helmet. The quality of her identification evidence of the accused cannot therefore be said to be good* as described in Turnbull. It thus requires supporting evidence. However, with regard to the required evidence in support, *she failed to give any description of the accused to the police soon after the incident. Neither was the identification parade conducted of any value as PW5 had seen the accused prior to that. Thus the dock identification of the accused conducted in such circumstances has no value. Accordingly, there was no evidence on the identification of the accused.*

(Emphasis by this court)

[42] In *Lee Lian & Ors v PP* (1956) 22 MLJ 191, the appellants were convicted on a charge of house trespass in order to voluntarily cause hurt to certain persons in contravention of s 451 of the Penal Code. In quashing the conviction of the second and third appellants, *His Lordship Thomson J* said:-

... As regards the second and third appellants *the whole case turned on the question of their identity and I am not prepared to say that had the evidence in question been excluded as it should have been the learned Magistrate would have come to the conclusion*

that they were guilty. Their appeals are therefore allowed and their convictions quashed.

(Emphasis by this court)

[43] In *The People (At the suit of the Attorney-General) v Dominic Casey (No 2)* (1) 1962 IR 33, Kingsmill Moore J for the Supreme Court:-

The necessity of giving a special direction where identification rests on the evidence of only one witness has already been judicially recognised. Thus in *The People (Attorney General) v Francis Hughes* Maguire CJ, giving the judgment of the Court of Criminal Appeal, said:- "Nevertheless, having regard to the circumstances that the case depended upon the identification of the applicant by one witness and that the accused was not professionally represented at the trial, this Court is of opinion that the greatest care was required in charging the jury, as to the way in which they should approach the case and particularly of the dangers inherent in evidence of visual identification."

In *The People v Keffard* (unreported) Mr Justice Kenny, giving the judgment of the Court of Criminal Appeal said, in reference to the possibility that the jury had convicted on the evidence of one identification witness:- "If they were entitled to do so this Court is satisfied that they could have done so only when they had been warned in the most specific terms of the dangers involved in visual identification … . There have been so many instances of mistakes in visual identification and the possibilities of error in this type of evidence are so numerous, that the jury should be directed on the necessity of exercising care in all cases where the visual identification is that of one witness only." The Court set aside the conviction because the evidence of identification was presented to the jury as a ground upon which they were entitled to convict the accused without any reference to the caution with which they should regard such evidence.

We are of the opinion that juries as a whole may not be fully aware of the dangers involved in visual identification nor of the considerable number of cases in which such identification has been proved to be erroneous and also that they may be inclined to attribute too much probative effect to the test of an identification parade. In our opinion it is desirable that in all cases, where the verdier depends substantially on the correctness of an identification their attention should be called in general terms to the fact that in a number of instances such identification has proved erroneous, to the possibilities of mistake in the case before them and to the necessity of caution. Nor do we think that such warning should be confined to cases where the identification is that of only one witness. *Experience has shown that mistakes can occur where two or more witnesses have made positive identifications.* We consider juries in cases where the correctness of an identification is challenged should be directed on the following lines, namely, that if their verdict as to the guilt of the prisoner is to depend wholly or substantially on the correctness of such identification they should bear in mind that there have been a number of instances where responsible witnesses, whose honesty was not in question and whose opportunities for observation had been adequate, made positive identifications on a parade or otherwise, which identifications were subsequently proved to be erroneous; and accordingly that they should be specially cautious before accepting such evidence of identification as correct; but that if after careful examination of such evidence in the light of all the circumstances, and with due regard to all the other evidence in the case, they feel satisfied beyond reasonable doubt of the correctness of the identification they are at liberty to act upon it.

This direction is not meant to be a stereotyped formula. It may be too condensed to be fully appreciated by a jury without some further explanation and the facts of

an individual case may require it to be couched in stronger or more ample terms, as when the witness or witnesses had no previous acquitance with the appearance of the accused or had only an indifferent opportunity for observation. It does however, contain a minimum warning which should be given in any case which depends on visual identification. No specific reference is made to "corroboration in a material particular implicating the accused." An item of evidence falling within this formula may, according to its nature, have very little or very great probative value. This consideration is meant to be covered by the words, "in the light of all the circumstances, and with due regard to all the other evidence in the case," and it is for the judge to deal with the lesser or greater probative value of any item of corroborative evidence."

In the case which has been referred to us a finding of the guilt of the accused depends substantially if not entirely on the acceptance of the identification by two witnesses, neither of whom had any previous acquitance with the prisoner .. .

(Emphasis by this court)

[44] In *Mahinder Singh v PP* [1967] 1 MLJ 126 at p 127, HT Ong FJ (as he then was) observed that:-

… It was not sufficient merely that the complainant appeared quite certain in his own mind that the accused was his assailant. It was clearly necessary for the court to examine also the grounds of his belief before regarding the question as closed. We have therefore, taken into consideration the complainant's answers elicited in cross-examination, which were undoubtedly material but which the judge had failed to take into account.

[45] In *Arthurs v Attorney-General for Northern Ireland* [1971] 55 Cr App R 161 at 168, Lord Morris of Borth-y-Gest of the House of Lords observed with the concurrence of the other members:-

Where conviction will involve the acceptance of the challenged evidence of one or more witnesses in regard to identification, a summing-up would be deficient if it did not give suitable guidance in regard to identification. The circumstances of individual cases will, however, greatly differ. Thus *there may be cases in which a witness can say that at a certain place and time he saw and clearly recognised the accused person. If the accused person was someone who was well known to him or at least was well known to him by sight and if the conditions at the relevant time were such that there was nothing to impede or to prevent recognition or to make recognition difficult, then a jury would mainly have to consider whether the witness was both truthful and dependable. In the present case the police constable knew the accused well. There was no dispute as to that.* It was for the jury to decide not only whether the police constable was a truthful witness but also whether the conditions which existed at the time when the police constable claimed to have seen and recognised the accused were such that a mistake might have been made … . There will, however, be some cases where the situation is very different. I refer to cases *where a witness has seen someone whom he does not in any way know and has had over a period of time to carry in his mind's eye a recollection of the person and then is at some later date asked (either at an identification parade or at some place) to say whether he can recognise the person whom he previously saw. In such a situation it is manifest that dangers may result from human fallibility.* I would leave for future consideration the question whether there is need to lay down any rule for the guidance of courts in such cases … .

(Emphasis by this court)

[46] In *Muharam bin Anson v PP* [1981] 1 MLJ 222, the appellant appealed to the Federal Court against his conviction and sentence of the offence of mischief by fire, in that he had set fire to a dwelling house belonging to the principal prosecution witness with intend to cause the destruction of the said building ordinarily used as a human dwelling contrary to s 436 of the Penal Code. In that appeal, *the only issue which was vigorously argued related to the identity of the person or persons who had intentionally set fire to the said dwelling house.* The appeal against conviction was dismissed. In that case, the main facts showed that both the principal prosecution witness and his wife and the appellant had been neighbours for more than 10 years although they did not appear to be at speaking terms at the material time. Further, the question of the possibility that the appellant might have been wrongly identified by the principal prosecution witness and his wife was also dealt with by the learned trial Judge where it was said:-

> In dealing with evidence of visual identification the court has to remind itself of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. The offence, in this case, was committed at night and the two witnesses saw the accused for no more than a few seconds. However, *when these two witnesses saw the face of the 1st accused they were only about 15 feet to 18 feet away from him and PW1 (Liaw Teck) flashed the torchlight on the face of the 1st accused who was known to them as a neighbour for more than 10 years. This was more a case of recognition than mere identification. Both witnesses said that they were sure that it was Muharam who came to their house. According to ASP Terence Wong (PW6) when he arrived at PW1's house (later that night) PW1 appeared to be very sure when he said that it was Muharam who set fire to the house.* After careful consideration of all the circumstances surrounding this case and the demeanour of the witnesses I was satisfied beyond reasonable doubt that it was the 1st accused who came and set fire to Liaw Teck's house." (Emphasis by this court)

[47] In *Rangula & Anor v PP* [1982] 1 MLJ 91 at pp 93 and 95, Yusof Abdul Rashid J said:-

> … Where the evidence of identity is poor then there is a need for supporting evidence as to the identification of an accused.
>
> It is not enough for the learned President to believe PW4 regarding the identification of the appellants just because PW4 had known the appellants for quite a considerable length of time. At the material day and time, he was able to see the appellants in a flash. As Lord Widgery CJ said the English Court of Appeal case of *R v Turnbull & Ors*, *supra*, at p 552 —
>
> … even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.
>
> On the above grounds I would allow the appeal and set aside the conviction and sentence.

[48] In *PP v Mardai* (1950) 16 MLJ 33, the Court of Appeal found inter alia the victim's evidence that the accused had outraged her modesty to be not convincing and that she did not implicate or name the accused as her assailant at the first reasonable opportunity after the commission of the offence or even in her police report. *Spenser Wilkinson J* said:

> … If the Magistrate had doubts as to whether it was the accused who went into the girl's room or as to what actually happened there when he went into that room, that would have been a reason for giving the accused the benefit of the doubt and acquitting him … .

[49] Accordingly, the finding of guilt by the learned Magistrate was set aside and the accused was acquitted as it was found to be unsafe to convict the accused on the evidence presented by the prosecution.

[50] In *Balwant Singh v PP* (1960) 26 MLJ 264, the learned Magistrate found the complainant's evidence in court as to the identification of the accused was corroborated by the identification of the appellant by the complainant at the identification parade. In quashing the conviction of the applicant for an offence of having sexual intercourse with a person who, was a patient and then under treatment at the Central Mental Hospital, Tanjong Rambutan. *Rigby J* said that:-

> "Now it is elementary, of course, that a witness cannot corroborate his own testimony and that independent evidence is required to constitute corroboration. There was no such independent evidence in this case … .

[51] In *KS Roberts v PP* [1970] 2 MLJ 137 HC, one of the question raised at the appeal was the identification of the appellant. Raja Azlan Shah J (as His Highness then was) at p 138 said:-

> Identification is a fact or circumstance which must be proved against an accused person before it can be relied upon and used against him. A fact or circumstance is held to be proved only when it fulfils the definition of the word 'proved' given in s 3 of the Evidence Ordinance. The evidence of identification is as much subject to this definition as any other kind of evidence but it would appear to me that in assessing the evidence of identification the trial court does not apply the tests provided in this section. It is true that an absolute certainty is not required but the court has to test the evidence with prudence and accept it only when it is so highly probable that its truth can safely be accepted. The test excludes from its orbit blind faith of a true believer, because prudence and credibility do not go together.

[52] In *PP v Pasupathy Kanagasaby* [2001] 2 CLJ 753, the respondent was charged and convicted in the Magistrate's Court Petaling Jaya on the alternative charge of voluntarily assisted in making away with property to wit a sum of RM246,157.96 in respect of EPF warrant which he had reason to believe to be stolen property and that he thereby committed an offence punishable under s 414 of the Penal Code. He was sentenced to 26 months' imprisonment and also to a fine of RM10,000 or in default to 8 months' imprisonment. The respondent then appealed to the High Court which allowed the appeal and set aside the conviction and sentence. The DPP then appealed against the decision of the High Court. One of the issues raised at the appeal to the Court of Appeal was that the identification parade was not properly held. In dismissing the appeal by the DPP, *His Lordship Mokhtar Sidin JCA* said:-

> Another important issue raised by the respondent was the identification parade held by the police where PW14 identified the respondent. The issue raised by the learned counsel for the respondent was in respect of the conduct of the parade itself in that the parade was not properly conducted. Two points were raised by the learned counsel for the respondent in respect of this.

The first point was in respect of the participants who took part on the identification parade. From the record it is clear that at the time when the parade was conducted the accused was 43 years of age. From the evidence there were seven participants on the parade, the youngest being 24 years and the oldest was 51 years of age. Of those seven only three participants were almost of the same age group as the respondent. Those three were 38, 39 and 45 years of age. In addition, it was established and not disputed that compared to the participants, the respondent was the tallest. Only two of the participants though shorter were almost of the same height as the respondent.

From the evidence which we have stated earlier, most of the participants were of different age and height from the respondent and according to the authorities the identification parade held was certainly unfair to the respondent. The learned DPP in his reply conceded the disparity but submitted that the respondent did not raise any objection when the parade was held. With the greatest respect to the learned deputy public prosecutor, we are of the view that it was not for the respondent to object but rather the duty of the officer conducting the parade to ensure that the parade was properly and fairly held. To ensure that the parade is properly and fairly held it is the duty of the officer conducting the parade to look for participants who are of similar age, stature and appearance as the accused person.

For the reasons we have stated, we find that the evidentiary value of the identification parade is worthless and the learned magistrate should not have considered the evidence of identification of the respondent by PW14 at the parade.

[53] In *(Junior) Reid v The Queen (PC)* [1989] 3 WLR 771, there was an appeal against the decision of the Court of Appeal of Jamaica which had dismissed the appeals of the appellants against the conviction of murder by the Kingston Home Circuit Court and the Portland Circuit Court. In delivering the Judgment of the Privy Council Lord Acknever said:-

It is only in comparatively recent times that identification evidence has emerged as a class of its own. Some 27 years ago in *The People (Attorney General) v Casey (No 2)* [1963] IR 33, the Supreme Court of Ireland decided that it was desirable in all cases where the verdict depended substantially on the correctness of visual identification of the accused, that the attention of the jury should be drawn in general terms to the fact that in a number of instances visual identification of an accused person had been established, after conviction, to have been erroneous, and therefore to the possibilities of mistake. This gave rise to the necessity for caution when considering such evidence. In the reserved judgment of the court, Kingsmill Moore J said, at pp 39–40:

We are of opinion that juries as a whole may not be fully aware of the dangers involved in visual identification nor of the considerable number of cases in which such identification has been proved to be erroneous; and also that they may be inclined to attribute too much probative effect to the test of an identification parade. In our opinion it is desirable that in all cases, where the verdict depends substantially on the correctness of an identification, their attention should be called in general terms to the fact that in a number of instances such identification has proved erroneous, to the possibilities of mistake in the case before them and to the necessity of caution. Nor do we think that such warning should be confined to cases where the identification is that of only one witness. Experience has shown that mistakes can occur where two or more

witnesses have made positive identifications. We consider juries in cases where the correctness of an identification is challenged should be directed on the following lines, namely, that if their verdict as to the guilt of the prisoner is to depend wholly or substantially on the correctness of such identification, they should bear in mind that there have been a number of instances where responsible witnesses, whose honesty was not in question and whose opportunities for observation had been adequate, made positive identifications on a parade or otherwise, which identifications were subsequently proved to be erroneous.

Some ten years later there were two much publicised cases where a miscarriage of justice was established, despite the apparent strength of the identification evidence (Dougherty and Virag). This brought identification evidence in England, as a separate class of evidence, into sharp focus.

In a very recent decision of the Privy Council, on appeals from the Court of Appeal of Jamaica, *Scott v The Queen* [1989] 2 WLR 924, Lord Griffiths, giving the judgment of the Board, reiterated the importance of the judge discussing with the jury the fundamental danger in identification evidence of the honest but mistaken witness, who is convinced of the correctness of his identification, giving impressive evidence. He said, at p 936:

… if convictions are to be allowed upon uncorroborated identification evidence there must be a strict insistence upon a judge giving a clear warning of the danger of a mistaken identification which the jury must consider before arriving at their verdict and that it would only be in the most exceptional circumstances that a conviction based on uncorroborated identification evidence should be sustained in the absence of such a warning.

Although the trial judge gave a long and detailed summing up, very fairly analysing and commenting on the prosecution evidence, the warnings about the dangers of identification evidence are to be found only in the following two passages:

Now there are people who are better able to recognise other people than others. There are people who would be so frightened that they would never recognise whether it was a dog or a puss who was holding the gun; but some people are better and so this is why you have to look at the witness too and see whether you can rely on what he says when he says that he recognised that gunman afterwards.

But, even an honest witness may be mistaken. He may not know that he is telling a lie. So this is why we are going into all these circumstances to see whether we can rely on it. You have known instances where you see someone whom you know quite well from behind or from before and you go to them and clap them on the shoulder and say: 'Hi John,' and with the look that the person turns and look at you, you realise that it is not the person. If this has ever happened to you and you are not under any stress, then you know that it is possible for you to mistake the identity of the person. So, you can see all the reason why we have to approach his evidence with caution.

Now it is clear that the first warning set out above is a warning in general terms applicable to all witnesses and the second warning adds very little to the first. What the judge failed to do was to explain that visual evidence of identification is a category of evidence, which experience has shown is particularly vulnerable to error, errors in particular by honest and impressive witnesses and that this has been known to result in wrong convictions. Accordingly identification evidence has to be treated with very special care … .

A … Although the judge stressed that the witness was a police officer, and suggested that his ability to identify people could well be greater than that of an ordinary member of the public, experience has undoubtedly shown that police identification can be just as unreliable and is not therefore to be excepted from now well established need for the appropriate warnings … .

B On a number of occasions during the course of his summing up the judge referred to the issue of common design. It is unnecessary for their Lordships to refer to all the passages where this occurred. It is sufficient to refer to the following direction:

C if they planned something and carried it out, all of them having one intention — because when I come to define murder, you see, there are two parts of the intention — all have the same intention, that is, to cause death or cause grievous bodily harm, and even though one would have fired, in this case all would have been responsible, it would be as if all three had their hands on the trigger even though only one actually pulled it. That is how the law looks at the matter.

D But it is for you to find, as a matter of fact, first of all, whether there was a plan, what did this plan include, whether it includes the use of the firearm to resist that day, and whether in fact Taylor and Reece together with Quelch, were all part of this plan, and the plan was carried out, the shooting took place, and as a result of the shooting, in fact, White died.

In the light of this and prior comments made by the judge their Lordships consider that the jury were properly directed on this aspect of the case.

E **[54]** In *Heng Aik Ren Thomas v PP* [1998] 3 SLR 465 at pp 475–476, Karthigesu JA said:

F In adapting the *Turnbull guidelines* for our local system, we have reworked the Turnbull guidelines into the *following three-step test.* The *first question* which a judge should ask when encountering a case against the accused depends wholly or substantially on the correctness of the identification evidence which is alleged by the defence to be mistaken. (Emphasis by this court)

G If so, the *second question* should be this. Is the identification evidence of good quality, taking into account the circumstances in which the identification by the witness was made? A non-exhaustive list of factors which could be considered include the length of time that the witness observed the accused, the distance at which the observation was made, *the presence of obstruction in the way of the observation, the number of times the witness had seen the accused, the frequency with which the witness saw the accused, the presence of any special reasons for the witness to remember the accused, the length of time which had elapsed between the original observation and the subsequent identification to the police and the presence of material discrepancies between the description of the accused as given by the witness and the* H *actual appearance of the accused.* In considering the circumstances in which the identification was made, the judge should take note of any specific weaknesses in the identification evidence. If the evaluation of the identification evidence, the judge is satisfied that the quality of the identification is good, he may then go on to safely assess the value of the identification evidence.

I Where the quality of the identification evidence is poor, the judge should go on to ask the *third question.* Is there any other evidence which goes to support the correctness of the identification. *If the judge is unable to find other supporting evidence for the identification evidence, he should then be mindful that a conviction which relies*

on such poor identification would be unsafe. The supporting evidence need not be corroborative evidence of the kind required in *R v Baskerville* (1916) 2 KB 658. *What the supporting evidence has to be is evidence that makes the judge sure that there was no mistake in the identification.*

(Emphasis by this court)

[55] It is only appropriate to state at this stage that times have gone where the prosecuting officer with respect, be it a DPP or a police officer who will stand up in court and graciously concede to some of the evidence or matters as emerged during the trial where it shows that some of the matters which were carried out by the investigation agency was flawed and not carried out in accordance with the requirements of the law and settled practice. In some cases, the DPP would also at the outset of an appeal inform the court that he does not support the conviction of the lower court although in *Chow Kok Keong v PP* [1998] 2 MLJ 337 at p 347, *Edgar Joseph Jr FCJ* said:-

> Now, it is undoubtedly the law, that *in a criminal case, we are in no way bound to act on a concession* of the sort made by Mr. Karpal Singh in this case but, that we can do so, in an appropriate case, we have no doubt. In this context, we need no more than refer to the numerous instances, when in appeals against conviction for the offence of trafficking in dangerous drugs in contravention of s 39B of the Act, the prosecution had conceded that the conviction could not stand, but that a conviction for some lesser offence, such as, for possession under s 6 or even s 12 of the Act, be substituted, and upon the defence agreeing to such a course, we had invariably, acted on the concession, without query, and substituted a conviction for such lesser offence." (emphasis by this court) (see *Ooi Leong Heng lwn PP*, Criminal Appeal No 09–3–2001 (decision of the Court of Appeal given on 26February 2004).

[56] As an officer of the court, the prosecuting officer, with respect is obliged and is expected to be candid and show utmost professionalism in carrying out his duty. His or her paramount duty is to assist the court with the truth and to introduce fairly and impartially all admissible evidence but surely not to cloud the relevant issues in order "to bolster a case which was clearly defective" or to protect the investigation agency where there are obvious flaws, irregularities, blunders and unethical practice during the investigation stage which is so obvious and found to be contrary to the law. If this court may ask, is it not the duty of the prosecuting officer to assist the court so as to ensure that the right person is found guilty and brought to justice based on all the relevant and admissible evidence and the innocent be acquitted and that an accused person be given the benefit of doubt where there are material gaps and break in the chain of evidence and this no doubt is subject of course to its own set of facts and circumstances in each case.

[57] Be that as it may, what this court has observed and commented should be embraced in good faith and accepted only as a reminder to all prosecuting officers that they should have no personal interest in procuring a conviction but purely to ensure that a decision is given in accordance with the true spirit of justice and fair play. By their very office, prosecuting officers are entrusted with the onerous responsibility of prosecuting crimes on behalf of the State. However, this duty must always be balanced against the rights

of an individual whose liberty is at stake where the State accuses him of a crime. It is indeed an arduous task to strike a balance between these two competing duties and rights which has led many to say that is merely an exercise in semantics and nothing more. No party should in the hope that evidence will emerge in the course of the trial, or rely on the weakness of the defence initiate any prosecution. In *Eng Sin v PP* [1974] 2 MLJ 168 at p170, the appellant was convicted on a charge of murder under s 302 of the Penal Code and sentenced to death by the High Court, Kuantan on 20 February 1974. On appeal, the Federal Court quashed the conviction and sentence. In that case, the prosecution had introduced a medical report which was the only piece of "evidence" which was tendered to link the accused with the crime of murder where the Doctor has stated that the appellant readily agreed without guilt that he had killed a man at 11pm during a fight. There was no evidence what the doctor meant by "without guilt". In allowing the appeal against the conviction and sentence, *Gill CJ* said at p 170:-

> "Introduction of this Report and the irrelevant evidence of incidents months before the subject matter of the present charge *give rise to the impression that the prosecution was trying to bolster a case which was clearly defective.* In this connection we would refer to the remarks made in the case Alec Bennett Sugarman.
>
> (Emphasis by this court):
>
> *It cannot be too often made plain that the business of counsel for the Crown is fairly and impartially to exhibit all the facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is* that the right person should be convicted, that the *truth should be known*, and that justice should be done. *It would be deplorable if any counsel for the Crown should refuse to stand on the real strength of his case and think that he can strengthen and support it by things collateral in a manner contrary to the letter and spirit of English law. By so doing he can only weaken his case and may prevent a verdict which ought otherwise to be obtained.* As the Lord Chancellor (Lord Sankey) said in *Maxwell* (24 Cr App R 152 at p 176): 'It must be remembered that the whole policy of English criminal law has been to see that as against the prisoner every rule in his favour is observed and that no rule is broken so as to prejudice the chance of the jury fairly trying the true issues. The sanction for the observance of the rules of evidence in criminal cases is that, if they are broken in any case, the conviction may be quashed'. (Emphasis by this court)

[58] Prosecuting officers are also expected as from the Bar to refer not only to those cases which support the prosecution case but also to those which are against their case so that the court's task is made easy to expound the law with the assistance of the Bar and the prosecuting officer, be it a police officer in the lower court or the DPP at the High Court. It is also noteworthy that where in the course of a trial, it emerges that the evidence of the prosecution is patently flawed either substantially or procedurally which does not justify calling upon the accused to enter into his defence, the prosecuting officer shall not be blinkered to the obvious but shall endeavour to admit the flaws and concede magnanimously as was the previous trend and practice at least till the 90's. This conduct and approach in the view of this court will not be perceived to be a weakness of the prosecuting officer but it will surely enhance the respect and dignity of his office. His candour, openness, propriety, decency and courtesy will certainly raise his esteem

and respect for himself and his office in the eyes of the public. In other words, unlike the past trend and practice, where the prosecuting officer had the professional courage to offer no evidence if during the course of the trial it became obvious that the prosecution case has shown cracks or was falling into pieces without any hope of being repaired in order to stabilize the damage which has occurred to parts of the evidence. Presently, some prosecuting officers seem not to exercise any discretion to concede to any of the weaknesses or flaws that emerges in the course of the prosecution case at the trial or at the appeal stage even if it disturbs the foundation of their case and glaringly tends to show that the accused cannot be found guilty based on that insufficient and doubtful evidence or in some cases where there is evidence of mistaken identity of the accused. Generally, when questioned by the court in some cases, as to their approach to the obvious flaw and weaknesses in the case, the reply from the prosecuting officer is that the instructions from their superiors is to proceed with the trial or appeal and leave it to the court to decide despite the blatant flaws and insufficient evidence to support the charge.

[59] This court earnestly hope that in the interests of the justice that this observation will no doubt take all parties to the beaten path that used to tread in the past where prosecuting officers were looked upon with great respect, honour and dignity for their conduct, candour, courtesy, transparency and firmness with qualities which were their greatest and priced asset. No amount of adjectives is sufficient to amplify this conduct and personality. All parties including defence counsels should strive to revive that error and infuse those great qualities to the present practices so that the powerful machinery bestowed on the prosecuting agency to prosecute offenders will not be seen to result in the wastage of tax payers money as a result of a failed prosecution which was patently obvious either right from the beginning or during the course of the trial or mid-stream or at the appeal. However, it must be mentioned at this stage that there are certainly some DPPs who are magnanimous in their approach to the cases they are assigned to handle where either at the outset or during mid-stream of an appeal the court will be informed that they do not support the conviction or sentence as the case may be and concede to certain flaws or weaknesses in the evidence of the prosecution. In some cases, there are also DPPs who are willing to point out at the appeal to the court the errors or evidence which shows "pieces of jigsaw" and material gaps in the case convicted by the trial court which cannot be supported as being unreasonable and against the weight of the evidence and in some cases, on the weaknesses of the investigation agency after the close of the prosecution case at the trial. Such prosecuting officers are to be commendable for keeping up to the customary practice, candour and high expectation as officers of the court in assisting the court to make the right decision and in order to save judicial time (see *Tan Boon Kean v PP* [1995] 3 MLJ 514 at p 536).

CASES WHERE IDENTIFICATION OF THE ACCUSED HAVE BEEN ACCEPTED BY THE COURT (FACTS TO BE DISTINGUISHED)

[60] The case of *Ong Poh Cheng v PP* [1998] 4 MLJ 8 which had referred to *Arumugam s/o Muthusamy v PP* [1998] 3 MLJ 73 and relied on by the learned DPP has to be distinguished on the facts of that case. In that case, there was overwhelming evidence to show that it was the appellant who was at the scene and he was identified by the complainant and two police constables whereas in the instant case before this court, the prosecution was relying solely on the evidence of PW6. Therefore, this court with respect cannot accept the submission of the learned DPP that this court has to follow the case of *Arumugam s/o Muthusamy v PP* and whilst recognising the principle of *stare decisis* and that this court is bound by the decision of the superior court and it requires no reminder that each case is decided on its own set of facts and wherever necessary the facts can be distinguished.

[61] In *Maidin Pitchay & Anor v PP* [1968] 1 MLJ 82**,** two police constables PW3 and PW6 had kept the first appellant under surveillance for 14 days and he was detained while in the act of conveying passengers. The first appellant was also seen by the police to have been using the same car for all 60 trips of conveyance of passengers of different origins. The first appellant was convicted by the Magistrate's Court, Parit Buntar for offences under ss 92(1) and 74(1) of the Road Traffic Ordinance 1958 namely, for using a m/vehicle as a public service vehicle without a valid licence and using the said vehicle without there being in force a policy of insurance in respect of third party risks in contravention of the aforesaid provisions of law. The appellants appealed to the High Court against the conviction. One of the grounds of appeal was that no identification parade was held for the purpose of identifying the first appellant as the person seen by police constables PW3 and PW6 conveying passengers. In dismissing the appeal against conviction *His Lordship MacIntyre J* held that:-

> I find little or no substance in the grounds urged in support of the contention that the convictions are against the weight of evidence. An identification parade is held when there is some doubt as to the identity of the person who is alleged to have committed the offence with which he is charged … .

RECOGNITION

[62] In *Dato' Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232 at p 261, Hashim Yeop A Sani J (as he then was) drew a distinction between recognition and identification which is as follows:-

> … it is important in my opinion to draw a distinction between *recognition and identification.* Recognition is more reliable than mere identification. Recognition of a person known to a witness would be more reliable then identification by a witness of a stranger.
>
> (Emphasis by this court)

[63] In *Yau Heng Fang v PP* [1985] 2 MLJ 335*,* the appellant who was originally charged for murder was convicted on a lesser charge at the close

of the prosecution case being an offence of culpable homicide not amounting to murder with three others still at large, an offence under the first limb of s 304 read with s 34 of the Penal Code and sentenced to 10 years imprisonment to take effect from the date of his arrest. The appellant appealed. One of the witness who claimed to have witnessed the appellant stab the deceased had testified that he had seen the appellant about 10 times prior to the incident where the appellant used to frequent an ice store where the witness PW10 also frequented. He also testified that he was about 10 feet from the deceased when the incident occurred. It is important to note that despite the fact PW10 in that case had seen the appellant about 10 times prior to the date of incident, the Federal Court still quashed the conviction and set aside the sentence where *Mohd Azmi SCJ* for the Federal Court said:-

> These are the qualities of the two material witnesses for the prosecution which the court was persuaded to rely on the *issue of identification and recognition. If the prosecution depends solely, as in the present case, upon visual identification by one or more witnesses, the Judge must withdraw the case from the jury if the evidence is of poor quality* (see *R v Turnbull*). In our opinion, both from the poor opportunity for the eye-witnesses to recognize the appellant and their poor quality as identity witnesses, their testimony on the issue of identity must be held to be inherently incredible. In the absence of evidence to connect the appellant with the crime, which is an essential element in any criminal prosecution, no *prima facie* case could have been established by the prosecution and the appellant should therefore have been acquitted without his defence being called. As such there is no necessity for us to deal with the defence of alibi." (emphasis by this court)

[64] In *Shand v R* [1996] 1 All ER 511 at p 512, the appellant was charged, convicted and sentenced to death on 28 April 1987 of murdering Dudley's Campbell by the Circuit Court Jamaica. He was identified as the murderer by two witnesses who knew him and who had seen him at different stages of the incident, independently in daylight at close quarters.

[65] The appellant's application for leave to appeal was refused by the Court of Appeal on 15 February 1988. He then appealed against that decision by special leave of Her Majesty's Privy Council:

> The evidence of the two eye-witnesses were briefly as follows:-
>
> The appellant, known as Duppy, was identified as the murderer by two witnesses. The first witness was Sonia Simmonds, who had known the appellant for over four years, seeing him sometimes twice a week at a shop in Mountain View where the appellant lived. On the day of the murder she was standing at a bus stop which was next door to a shop. Four young men including the deceased and one Philip Daley the second witness went into the shop. She followed them into the shop. Subsequently she came out onto a piazza where she saw a man jump over a wall onto the piazza and come towards her. He had a short gun in his hand and she called out to the men in the shop: 'Duppy ah come', at a time when he was about 18 feet from her. The second witness ran out of the shop and she then heard an explosion. The second witness held his side, spinning in the road. At the time of the explosion the appellant was about four feet from her. The deceased then ran out of the shop. When he was facing the appellant the latter had the gun in his hand and she heard three explosions. The deceased ran into the street and she saw him lying in front of the piazza. She did not see the appellant again. She

did not see anyone else with a gun. Her evidence was challenged solely on the basis that she was not at the shop at all when the deceased was killed and that her whole story was a lie.

"The second witness to identify the appellant was Philip Daley, who had been shot. He said that he had known the appellant for five years, though the latter said that as they had been brought up in the same area they had known each other longer, for around 12 years. When he was at the shop door the appellant came through the lane beside the shop with a gun. He was about ten yards away when the second witness first saw him. He ran down the road when he heard an explosion like a gun shot and felt something hit him in the back and pass through his body. He staggered into the lane, hearing three more shots. When he stopped he looked over his shoulder to see the appellant on the piazza. He was then taken to hospital. Again his evidence was challenged on the basis that he did not see the appellant that morning. He denied this: 'Five years I know him if him turn back way a know him, sideways a know him, him face a know him, is him.'

The first ground of appeal is that the trial judge failed to give a warning to the jury about the identification evidence in accordance with the guidelines set out in *R v Turnbull* [1976] 3 All ER 549 at pp 551–552.

[66] In dismissing the appeal, their Lordship's found that in the present case the evidence of identification also was exceptionally good. Lord Slynn of Hadley who delivered the judgment of the Privy Council said:-

"….. *The appellant accepted that he had known both witnesses for a long time* (indeed, as already pointed out, he said that he had known Daley for much longer than Daley said that they had known each other). The identification took place in daylight and both witnesses saw the appellant at close quarters. Sonia Simmonds reaction was immediate when she saw the gunman: 'Duppy ah come'. Daley left quickly, no doubt because of past disputes, fearing danger because it was the appellant with a gun. There is nothing to suggest that these witnesses who saw the appellant at different stages and independently and identified him without any doubt were mistaken or that they possibly could have been mistaken."

[67] This court finds that the defence have managed to cast doubt on the prosecution story during the prosecution case itself by eliciting evidence through cross-examination of the prosecution witnesses, PW6, PW7, PW8, PW10 and PW12 that the identification of both the accused persons whom PW6 seem to have seen at the scene of the crime as the two persons who had assaulted him is in doubt and ought to be rejected. Accordingly, the dock identification of both the accuseds in court does not assist the prosecution to overcome the defects in the identification parade and the court is unable to accept the evidence in support of the prosecution case as being unreliable and valueless.

COMMON INTENTION

[68] On the facts in the instant case, there is no scrap of evidence as to the relationship of both the accused persons with the other two persons who had assaulted the deceased and who are at large. Therefore, it cannot attract the doctrine of common intention against both the accused persons to have committed the offence in furtherance of the common intention with the two other persons who are at large unless there is evidence of a prior meeting of

mind to form the pre-arranged plan to commit the offence at the interval prior to the attack or even if the intention had developed on the spot. Based on the evidence adduced, there is insufficient evidence to warrant any inference of common intention against the accused persons.

[69] This court finds that the evidence of PW6 when tested with the rest of the evidence adduced on behalf of the prosecution especially the evidence of the investigating officer PW12 and the officers PW8 and PW9 who conducted the identification parade is wholly unsatisfactory, unreliable and unsafe to accept in order to connect the accused persons with the other two persons who are at large of the murder notwithstanding that the evidence on the ingredients for the offence of murder itself is questionable and has not been established by the prosecution. The contention of the learned DPP that the assault by the first and second accuseds on PW6 and/or the deceased *by two other persons who are still at large* was done almost simultaneously cannot be sustained and is against the weight of the evidence. Even assuming that the assault on the deceased by the two persons who are at large and the assault on PW6 was committed simultaneously, there is still insufficient evidence to draw any inference of common intention against both the accused persons on the offence of murder as framed against them. Infact during examination-in-chief, PW6 has testified that it is only after the other two male Indians had strangled the deceased neck and hit the deceased's neck, one of the remaining two Indians strangled PW6's neck. PW6 has also testified that at the time when the deceased was assaulted, he did not give any assistance to the deceased because he was taking mineral water. On the other hand under cross-examination by counsel for the first accused, PW6 has testified that at the time when he was taking mineral water, he saw the deceased being attacked. PW6 has also testified that he and the deceased were not attacked at the same time.

[70] Section 34 of the Penal Code states as follows:-

> Each of several persons liable for an act done by all, in like manner as if done by him alone.
>
> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[71] In order to attract or trigger the law of common intention, there must be reliable and cogent evidence accepted by the court as true or which could reasonably be inferred so as to implicate the accused persons. (see *Ratanlal's Law of Crimes* 25th Ed Vol 1). In *Joginder Singh v State of Haryana* AIR 1994 SC 461, the Supreme Court observed:

> It is one of the settled principles of law that the *common intention* must be anterior in time to the commission of the crime. It is also equally settled law that the intention of the individual has to be inferred from the overt act or conduct or from other relevant circumstances. Therefore, the totality of the circumstances must be taken into consideration in order to arrive at a conclusion *whether the accused had a common intention to commit the offence* under which they could be convicted. The pre-arranged plan may develop on the spot. In other words, during the course

of commission of the offence, all that is necessary in law is the said plan must proceed to act constituting the offence … .

(Emphasis by this court)

[72] In *Pandurang v State of Hyderabad* AIR 1955 SC 216, five persons which included the three appellants, were convicted and sentenced to death for the murder of one Ramachandran under s 302 of the Penal Code. The three appellants having been granted special leave to appeal, filed their appeal to the Supreme Court. The other two did not appeal. In that case, all the assailants ran away after the assault on the deceased when the eye-witnesses arrived and later absconded but the court found there was nothing to indicate that they ran away together as a body, or that they met afterwards. The first appellant Pandurang who was armed with a lethal weapon had inflicted a light head injury on the deceased. However, on appeal, the Supreme Court, was of the view that the facts disclosed did not warrant an inference of common intention against the first accused, Pandurang. The Supreme Court had also distinguished the facts in *Mamand v Emperor* AIR 1946 PC 45 where the learned DPP had submitted that the *accused ran away and that the court had taken into consideration the evidence of running away together as an inference of common intention.* Nevertheless, the Supreme Court in delivering the decision in favour of Pandurang had distinguished the facts in *Mamand v Emperor* AIR 1946 PC 45. In *Mamand*'s case, in addition to the accused all running away, there was evidence of enmity on the part of the accused. There was evidence that all the three accuseds lived together and that one was a younger brother and the other, a tenant of the appellant. The court also found on the facts in that case, that they all ran away *'together'* not simply that they ran away at the same moment of time when discovered, but that they ran away *'together'*. *Boss J* for the Supreme Court at p 222 said:-

> *Now in the case of section 34 we think it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all: — Mahbub Shah v Emperor AIR* 1945 PC 118 at pp 120 & 121 (B). *Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others*; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case: AIR 1925 PC 1 at pp 5 & 6 (A) and AIR 1945 PC 118 (B). As their Lordships say in the latter case, "*the partition which divides their bounds is often very thin: nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice*.

The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example when one man calls on bystanders to help him kill a given individual and they, either by their words or their acts, indicate their assent to him & join him in the assault. There is then the necessary

meeting of the minds. There is a pre-arranged plan however hastily formed and rudely conceived. *But pre-arrangement there must be and premeditated concert.* It is not enough, as in the latter Privy Council case to have the same intention independently of each other, e.g., the intention to rescue another and, if necessary, to kill those who oppose.

In the present case, there is no evidence of any prior meeting. We know nothing of what they said or did before the attack — not even immediately before. Pandurang is not even of the same caste as the others. Bhilia, Tukia and Nilia are Lambadas, Pandurang is a Hatkar and Tukaram a Maratha. It is true prior concert and arrangement can, and indeed often must, be determined from subsequent conduct as; for example, by a systematic plan of campaign unfolding itself during the course of the action which could only be referable to prior concert and pre-arrangement, or a running away together in a body or a meeting together subsequently. But, to quote the Privy Council again:

> the inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case

But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of case. At bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. *All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the time-honoured way, "the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis.* (*Sarkar's Evidence*, 8th ed, p 30).

The learned counsel for the State relied on — *Mamand v Emperor* AIR 1946 PC 45 (C), because in that case the accused all ran away and their Lordships took that into consideration to establish a common intention. But there was much more than that. There was evidence of enmity on the part of the accused who only joined in the attack but had no hand in the killing, and none on the part of the two who did the actual murder. There was evidence that all three lived together and that one was a younger brother and the other a tenant of the appellant in question. There was evidence that they all ran away 'together:' *not simply that they ran away at the same moment of time when discovered*, but that they ran away 'together'.

(Facts have to be distinguished – elaboration and emphasis by this court)

[73] In *Kripal v State of Uttar Pradesh* AIR 1954 SC 706, the Supreme Court, on the facts found that there was no common intention to be attached against the appellants, Kripal and Sheoraj on the conviction under s 302 of the Penal Code. Accordingly, the conviction against both Kirpal and Sheoraj under s 302 of the Penal Code was set aside (see *DA Desai and Khalid* AIR 1984 SC 1717 at 1718). *Jagannadhadas J* for the Supreme Court said:-

> The learned Judges of the High Court quite rightly pointed out that a preconcert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. Whether in a proved situation all the individuals concerned therein have developed only simultaneous and independent intentions or *whether a simultaneous consensus of their minds to bring about a result* can be said to have been developed and thereby intended by all of them, *is a question that has to be determined on the facts.*

[74] In the instant case, there was no evidence that all the four persons ie the two accused persons and the two persons who are at large had arrived together and at the same time except that all the four persons in the two groups were eating durians. In fact according to PW12, there was no evidence that both the accused persons left the scene together with the two other persons who attacked the deceased or separately as there was only one exit. The fact that both the groups had gone out by the same exit does not necessarily mean that all the four persons had gone out together and this fact alone does not necessarily mean that the two accused persons had the common intention as that of the two other persons who are at large and that it was the furtherance of that common intention the offence of murder was committed. Even if there was evidence which positively shows that the two accused persons were present at the scene of the crime which this court had ruled otherwise as the identification was not reliable and unsafe to accept, the mere fact of their presence alone would be insufficient or without more to connect them with the assault of the deceased by the two other persons who are at large. Based on the evidence, this court is of the view that the assault on the deceased by the two persons at large and who have not been identified was a separate and independent act and the liability is individual to them and it does not have any connection so as to attach any common intention against the accused persons.

[75] In *Lee Yoon Choy and 2 Ors v PP* (1949) 15 MLJ 66, Court of Appeal (Willan, CJ, Spenser Wilkinson J and Russell J) said:-

> … (1) that the law of common intention in this country is defined in Section 34 of the Penal Code and under the terms of that Section, *there must exist a common intention to commit the crime actually committed and it is not sufficient that there should be merely a common intention to behave criminally;* (2) that there was no evidence in this case of any common intention to possess the arms or ammunition and therefore the conviction of the second and third appellants for possession of the arms and ammunition must be set aside;
>
> (Emphasis by this court)

[76] In *Isa bin Che Noh v PP* (1956) 22 MLJ 93, His Lordship Rigby J said:-

> … for the prosecution to succeed in the case against the second and third appellants, *it was necessary to establish that there was a pre-arranged plan between all three appellants, not merely to assault the complainant but to assault him with a "parang" or other cutting instrument. In my view the evidence in this case was insufficient to establish beyond reasonable doubt that there was in fact any such common intention between the three accused … .*
>
> (Emphasis by this court)

[77] In *Chew Cheng Lye v Reg* (1956) 22 MLJ 240 at p 241, Whitton J held that:-

> … before the section applies there must on the construction of its language be more than a joint venture to commit crime. I would say it must be established that more than one person participated in the commission of the criminal act which forms the subject of the charge, although in certain circumstances mere

presence may constitute participation. In this case I do not think participation on the part of the appellant has been proved.

[78] In *Wong Nyet Wah v PP* (1962) 28 MLJ 312 which followed the case of *Gray* 12 Cr App Report 244, His Lordship Lord Reading CJ said:-

> Equally it must be borne in mind that the mere fact of standing by when the act is committed is not sufficient. A man, to become amenable to the law, must take such a part in the commission of the crime as must be the result *of a concerted design to commit the offence."*
>
> (Emphasis by this court)

[79] In *Tansley v Painter* 1969 Crim LR 139, the Court of Appeal through His Lordships Lord Parker CJ, Ashworth and Willis JJ said:-

> The question was not whether D1 knew what was going on *but whether he was a party to a joint venture. Mere knowledge of what D2 was doing was not sufficient.* There was no evidence entitling the justices to convict … .
> (Emphasis by this court)

[80] In *R v Searle and Others* [1971] Crim LR 592, at the appeal, the Court of Appeal through Lord Widgery CJ, Roskill and Caulfield JJ (as he then was) in allowing the appeal against conviction stated as follows:-

> … the effect of those parts of the summing-up was to equate knowledge with possession. However, *mere knowledge of the presence of a forbidden article in the hands of a confederate was not enough: joint possession had to be established.* The sort of direction which ought to have been given was to ask the jury to consider whether the drugs formed a common pool from which all had the right to draw at will, and *whether there was a joint enterprise to consume drugs together because then the possession of drugs by one of them in pursuance of that common intention might well be possession on the part of all of them*: *Thompson* (1869) 21 LT 397. The summing-up was inadequate and possibly misleading … .
>
> (Emphasis by this court)

[81] In *Dato' Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232 at p 267, His Lordship Hashim Yeop A Sani J (as he then was) said:-

> Under s 34 of the Penal Code, to succeed the prosecution must prove that the criminal act was done in concert pursuant to the prearranged plan or arrangement. In practice it is of course difficult to produce direct evidence to prove the intention of an individual. In most cases, however, it can be inferred from his act or conduct or other relevant circumstances of the case. See *Mahbub Shah v King Emperor.* The doctrine of common intention is as expressed in s 34 of the Penal Code itself which reads:
>
> > When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.
>
> It is also a common-sense principle that if two or more persons intentionally do a thing jointly it is just the same as if each of them had done it individually. If two or more persons combine in injuring another in such a manner that each person engaged in causing the injury must know that the result of such injury may be the death of the injured person, it is no answer on the part of anyone of them to

allege, and perhaps prove, that his individual act did not cause death, and that by his individual act he cannot be held to have intended death. Every one must be taken to have intended the probable and natural results of the combination of acts in which he joined.

Thus it is clear that the leading feature of section 34 of the Penal Code is the element of participation in action. Two preliminary elements are in fact necessary to fulfil the requirements of section 34. *First, there must be evidence (direct or by inference) the accused was present at the scene of the crime. Secondly, there must be evidence to show that there was prior concert or prearranged plan involving the accused. This is logical because how can there be participation without physical presence? Even passive participation may require physical presence." (see Juraimi Husin v PP* [1998] 2 CLJ 383 at p 430).

(Emphasis by this court)

[82] In *Ng Ah Kiat v PP* [1987] 2 MLJ 336 at p 344, His Lordship Syed Agil Barakbah SCJ said:-

In law, common intention requires a prior meeting of the minds and presupposes some prior concert. Proof of holding the same intention or of sharing some other intention, is not enough. There must be proved either by direct or by circumstantial evidence that there was (a) a common intention to commit the very offence of which the accused persons are sought to be convicted and (b) participation in the commission of the intended offence in furtherance of that common intention.

(Emphasis by this court)

… Direct intention of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, *common intention may be inferred from the facts and circumstances of the case and the conduct of the accused.*

(Emphasis by this court)

[83] In *Namasiyiam & Ors v PP* [1987] 2 MLJ 336 at p 344, His Lordship Syed Agil Barakbah SCJ said:-

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… Direct evidence of a prior plan to commit an offence is not necessary in every case because common intention may develop on the spot and without any long interval of time between it and the doing of the act commonly intended. In such a case, common intention may be inferred from the facts and circumstances of the case and the conduct of the accused. (*The Supreme Court (of India) on Criminal Law 1950* — 1960 by JK Soonavala pp 188 to 193).

[84] In *Kamaruzaman Mat Hassan & Anor v PP* [1997] 5 CLJ 279, at p 286, KC Vohrah J (as he then was) observed:-

One aspect of common intention that is often forgotten is that in a criminal prosecution where s.34 is involved it is no incumbent on the prosecution to prove

that there existed between the participants a common intention to commit the particular offence committed. As is observed in *Chitaley and Bakhale: Indian Penal Code* (2 Ed), Vol 1, p 162, the "criminal act" (stated in s 34) must be done by the several persons alleged to have taken part in it, "in furtherance" of the common intention of all of them and it involves two propositions:

(a) That *there must be a common intention on the part of several persons to commit a certain crime*;

(b) The *crime actually committed must be in furtherance or fulfilment of the common design.*

In regard to the second proposition the authors observes that *if the crime is one which falls outside the purview of the common design, this section will not apply and no person other than the one who has actually committed such crime will be liable for the offence* or offences involved in the crime.

(Emphasis by this court)

The illustration given by the authors is helpful to understand the second proposition. Thus, suppose A and B set out to give a beating to C and their agreed intention is to use only their fists in the fight. If an unlucky blow causes C's death, both A & B will be liable for the death. But, if in the fight, B, without A's knowledge or consent, whips out a knife, which he has concealed on his person and stabs C with it and kills C, A will not be responsible for B's act. But it is B alone that will be responsible for it.

[85] In *Muhamad Safarudin Baba & Anor v PP* [2002] 4 CLJ 210 at p 222, His Lordship Mohd Noor Ahmad JCA (as he then was) said:-

It is trite law that *common intention within the meaning of s 34 of the Code implies a pre-arranged plan* and to convict an accused person of an offence applying the section *it must be proved that the criminal act was done in concert pursuant to the pre-arranged plan*. It is difficult if not impossible to procure direct evidence to prove intention; likewise a prior concerted plan. In most cases it has to be inferred from the acts or conduct of the parties or other relevant circumstances of the case (see the Privy Council case of *Mahbub Shah v Emperor* AIR (32) [1945] PC 116). *We are of the view that although the conduct of the 1st appellant on that occasion and his awareness that the 2nd appellant was carrying the box might be relevant factors in order to consider the element of common intention but the knowledge presumed by s 37(d) of the Act upon the 2nd appellant ought not to have been imputed to the 1st appellant because he did not have the custody or control of the box. Those two relevant factors by themselves were not sufficient to raise the inference of common intention, although they might raise the suspicion that the 1st appellant was involved with such drug. Suspicion, no matter how strong, is not evidence.*

(Emphasis by this court)

[86] This court is of the view that there must be at least evidence of some common design between the two groups of person that is, between the two accused persons and the two other persons who are at large and that is if on the assumption there is sufficient and reliable evidence to show the presence of both the accuseds at the scene of the crime and that they were the same persons who assaulted PW6 and that the common design must be to commit murder or to inflict grievous bodily harm on the deceased and that the criminal act carried out was in consort and pursuant to the pre-arranged

plan be it on the spot. Any inference of common intention as termed in s 34 of the Penal Code can only be invoked if there is necessary inference deducible from the circumstances of the case. Common intention does not mean same or similar intention. The language used in s 34 of the Penal Code should not be stretched too far to the extent that it may tantamount to straining the language beyond its purpose and ambit.

[87] In the instant case, the essential ingredients which the prosecution ought to have proved as laid out in the charge against the accused persons is:-

a the deceased Lee Kin Chong was murdered;

b the cause of death was infliction of bodily injury;

c the murder was committed by the two accused persons together with two other persons who are at large to be read with s 34 of the Penal Code.

[88] In the instant case, the prosecution was only able to prove that the deceased Lee Kin Chong was dead and the cause of death was infliction of bodily injury and that he was murdered. The other ingredients of the offence so as to implicit the two accused persons, the prosecution had failed to connect them with the crime of murder as charged.

[89] On the facts in the instant case, the truth is that there was nothing in the evidence which gave grounds for anything more than suspicion and it is hardly necessary to observe and repeat that suspicion is not legal proof. (see *Kalimuthu v PP* (1955) 21 MLJ 187 at p188. "The merest scintilla of evidence on the part of the prosecution is insufficient to justify the conviction." (per Lord Roche in *Seneviratne v R* [1936] 3 All ER 36 at p 48).

OBSERVATION OF PW6 BY THIS COURT

[90] This court had observed closely throughout the evidence of PW6 that every time a question was put to him either during examination-in-chief, cross-examination or re-examination, the interpreter has to take a long time to obtain answers from PW6 to interpret to the court and the answers given at times were not directed to the questions raised by the parties. As a result, the same questions had to be repeatedly put across to the witness PW6 and several times this court had to ask the interpreter whether there was any difficulty between the interpreter and the witness to understand each other. The interpreter informed the court that the witness PW6 was not able to follow the questions and therefore he had to explain over and over again before he could obtain the answers to the questions. Having observed the witness at the stand, this court is of the view that the testimony of the witness was open to grave doubt as to what he truly saw, witnessed and his recollection. In the absence of reliable and trustworthy evidence and considering the totality of the evidence, this court finds that it is most unsafe to place any reliance on the identification evidence as adduced on behalf of the prosecution so as to link both accused persons first, to have been at the scene of the crime, and secondly, to have common intention together with the two other persons who are at large for the offence of murder.

[91] Based on the following cases, it is expressly clear that suspicion however grave is not legal proof and there is no burden of proof placed on the accused for an offence under s 302 of the Penal Code and it is for the prosecution to establish the charge against the accuseds. In the instant case, this court found that the prosecution had failed to link both the accuseds to the commission of the offence which was committed by two other persons who are still at large.

[92] In *Dato' Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232 at p 269, His Lordship Hashim Yeop A Sani said:-

> I admit there is a lot of suspicion cast on Nordin Johan and Aziz Abdullah. I will not conjecture how they will live out this suspicion. *But in our system of administration of justice suspicion, however strong, cannot be a substitute for proof by admissible evidence.*
>
> (Emphasis by this court)

[93] In *PP v Ong Cheng Heong* [1998] 6 MLJ 678 at p 704, His Lordship Vincent Ng J said:-

> … It is trite law that *evidence that merely engender suspicion and surmise — however compelling — ought to be disregarded* unless such evidence attains the requisite high level of criminal proof.
>
> (Emphasis by this court)

[94] In *R v Wallace* 23 Cr App 32 at p 35, His Lordship Hewart LCJ for the Court of Appeal said:-

> … suffice it to say that we *are not concerned here with suspicion, however grave, or with theories, however ingenious.*
>
> (Emphasis by this court)

[95] In *PP v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576 at p 599 His Lordship Visu Sinnadurai J referred to the case of *R v Courtie* [1984] 1 All ER 740 at p 741 wherein Lord Diplock had explained the dicta of Lord Sankey in the case of *Woolmington v DPP* [1935] AC 462 as follows:-

> … an accused person cannot be convicted of any offence with which he is charged unless it has been established by the prosecution that each one of the factual ingredients which are included in the legal definition of that specific offence was present in the case that has been brought against him by the prosecution … .

[96] In *PP v Lim Teong Seng and 2 Ors* (1946) 12 MLJ 108, Laville J observed:-

> … The onus is on the prosecution and never shifts to prove its case. The presiding officer is sitting not only as a judge but as a jury.
>
> If therefore at the close of the prosecution he (namely, the judge) as a jury comes to the conclusion, not that there is no evidence, *but that the evidence produced is not strong enough to warrant a conviction,* and only evidence beyond all reasonable doubt is of that nature, he is not by the spirit of English law entitled to say: 'I am doubtful of this evidence but let us see if it can be supplemented and improved by what can be elicited from the defence'. The prosecution who have to prove their case beyond all reasonable doubt have produced all the evidence they

have, and it is on this evidence the conviction if any must rest, even if the accused calls evidence. What the prosecution can elicit for its view from them is either supplementary or redundant, or goes to lessen the credibility of the defence evidence. It cannot be that basis of a conviction. If therefore at the close of the prosecution the Court is of opinion that on that evidence it cannot, as a jury, hold the allegations proved beyond all reasonable doubt, there is nothing left for it to do but to acquit the accused.

(Emphasis by this court)

[97] In *PP v R Balasubramaniam* (1948) 14 MLJ 119 at p 120, Callow J said:-

… *The onus is on the prosecution to prove the case and this burden never shifts* … .

(Emphasis by this court)

[98] In *Sarwan Singh Rattan Singh v State of Punjab, and State of Punjab and Harbans Singh Bhan Singh, and Harbans Singh Bhan Singh v State of Punjab* AIR 1957 SC 637, Gajendragadkar SCJ for the Supreme Court said:-

… There may be also an element of truth in the prosecution story against the accused. *Considered as a whole, the prosecution story may be true; but between 'may be true' and 'must be true' there is inevitably a long distance to travel and the whole of this distance must be covered by the prosecution by legal, reliable and unimpeachable evidence before an accused can be convicted.*

(Emphasis by this court)

[99] In *Ibrahim v PP* (1962) 28 MLJ 235, Hashim J said:-

The defence should not be called where the prosecution has failed to prove its case. *Under no circumstances should a magistrate call for the defence merely to clear any doubt he may have in his mind as to whether the prosecution had or had not proved its case.*

(Emphasis by this court)

[100] In *Sia Soon Suan v PP* [1966] 1 MLJ 116, His Lordship HT Ong CJ said:-

… the requirement of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether the court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else … .

[101] In *PP v Saimin & Ors* [1971] 2 MLJ 16 at p 17, His Lordship Sharma J said:-

A conviction cannot be sustained even if the court is satisfied that the prosecution story "may be true" unless and until it is found that the prosecution story "must be true". The burden of proof remains on the prosecution throughout the trial. If the learned magistrate was not satisfied with the case of the prosecution it was his duty to acquit and discharge the accused at the close of the prosecution case. The falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt. The burden of proving guilt in a criminal charge is always on the prosecution except in certain cases with which we are not concerned here.

[102] In *Zahari bin Yeop Baai & Anor v PP* [1980] 1 MLJ 160 at p 163, His Lordship Hashim Yeop A Sani J (as he then was) said:-

> Looking at the grounds of judgment I have come to the conclusion that the *learned President had failed to take into account or to give sufficient consideration to every material circumstance that was in favour of the appellant available in the evidence of the prosecution witnesses themselves*. Based on all the foregoing it is my view that the conviction and sentence of both the appellants should be set aside and I so order … .
>
> (Emphasis by this court)

[103] In *Pavone v PP (No 2)* [1986] 1 MLJ 423 at p 426, His Lordship VC George J (as he then was) said:-

> In the instant case although the accused appeared to have been caught red-handed there has been more than one material gap in the prosecution case. The appeal has to be allowed.

[104] In *Krishnan v PP* [1987] 1 MLJ 292 at p 295, His Lordship Wan Sulaiman SCJ said:-

> It is one of the most basic rules of justice that however heinous a crime a person is accused of, whatever the rank of the person who testifies against him, he can only be convicted on evidence produced according to the stringent requirements of the law. *It cannot be questioned that the offence of trafficking is a very serious one, the gravity of which is reflected in the sentence, in this case the sentence of death.* But it does not mean that a person accused of one of the most serious crimes known to our law is not entitled to equal protection before the law and one of those items of protection to which he is entitled is that *his guilt must be proved in accordance with or in a manner required by law*. Anything less will not be enough.
>
> (Emphasis by this court)

[105] In *Choo Chang Teik & Anor v PP* [1991] 3 MLJ 423 at p 425, His Lordship Mohamed Yusoff SCJ said:

> Be that as it may, we feel that in offences involving capital punishment such as trafficking in drugs, evidence by inference alone is not sufficient to support a conviction of the appellant without some proof of the element of control.
>
> In the present case we are of the view that although it is unfortunate that a guilty party cannot be brought to justice, it is more important that there should not be a miscarriage of justice and the law should be maintained that the prosecution should prove its case.
>
> … we feel that in offences involving capital punishment such as trafficking in drugs, *evidence by inference alone is not sufficient to support a conviction of the appellant without some proof of the element of control.*
>
> (Emphasis by this court)

[106] The duty of proving the guilt of the accuseds as framed by the charge is solely and wholly on the prosecution is well settled in law and requires no reminder or repetition. In *Pang Chee Meng v PP* [1992] 1 MLJ 137 at p 141, *Abdul Hamid Omar LP* said:-

There is no obligation on the accused person to establish his innocence. *The duty is solely and wholly on the prosecution to prove the guilt of the accused. An accused person is entitled to the benefit of any other reasonable inference which could be deduced during the prosecution indicating his innocence.* In fact, the evidence of the prosecution on its totality does not even lead to grave suspicion to link them to the murder and bearing in mind that *suspicion is not evidence, however grave it may be*.

(Emphasis by this court)

[107] In *R v Kelly* (1992) 92 DLR (4th) 643 (SCC) at p 667, His Lordship McLachlin J said:-

It is a fundamental proposition of the criminal law that the law be certain and definitive. This is essential, given the fact that what is at stake is the potential deprivation of a person of his or her liberty and his or her subjection to the sanction and opprobrium of criminal conviction. This principle has been enshrined in the common law for centuries, encapsulated in the maxim *nullum crimen sine lege, nulla poena sine lege* — there must be no crime or punishment except in accordance with law which is fixed and certain.

This rule is particularly significant in a penal provision that attracts the death penalty as in this case … .

[108] In *Abdullah Zawawi bin Yusoff v PP* [1993] 3 MLJ 1 at p 9, His Lordship Edgar Joseph Jr SCJ said:-

True it is that though there were several strands of evidence pointing to the appellant's guilt, not one of them alone was of great moment and the question arises, whether *juncta juvant* it could be said that there was sufficient evidence to support a verdict of guilty. It was our view that this question must be answered in favour of the appellant considering that there was more than one way in which the evidence adduced by the prosecution might be viewed. We have already remarked that the evidence could have been regarded as implicating the appellant or the wife or, the both of them, or the informer or even Mohammad.

Having examined the evidence led by the prosecution afresh, we found that the *evidence left too many questions unanswered with the result that the proverbial cap might have fitted not just the head of the appellant but that of others as well.*

(Emphasis by this court)

[109] In *PP v Muhamad Nasir bin Shaharuddin & Anor* [1994] 2 MLJ 576 at p 592, His Lordship Visu Sinnadurai J said:-

It is one of the most basic rules of justice that, however heinous a crime a person is accused of, whatever the rank of the person who testifies against him, *he can only be convicted on evidence produced according to the stringent requirements of the law.* It cannot be questioned that the offence of trafficking is a very serious one, the gravity of which is reflected in the sentence, in this case the sentence of death. But … his *guilt must be proved in accordance with or in a manner required by law. Anything less will not be enough.*

(Emphasis by this court)

[110] In *Ti Chuee Hiang v PP* [1995] 2 MLJ 433 at p 441, His Lordship Edgar Joseph Jr FCJ said:-

We were thus driven to the inevitable conclusion that the maintenance of the principle involved in this case was more important than the case itself. This is the principle

enunciated in *Maxwell v DPP* [1934] 24 Cr App Rep 152 at p 176; [1934] All ER Rep 168 at p 175: A

> … It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded or discredited.

[111] In *Looi Kow Chai & Anor v PP* [2003] 2 MLJ 65 at p 80, His Lordship Gopal Sri Ram JCA said:- B

> In our respectful view, the correct test to be applied in determining whether a prima facie case has been made out under s 180 of the CPC (and this would apply to a trial under s 173 of the CPC) is that as encapsulated in the judgment of Hashim Yeop Sani FCJ (as he then was) in *Dato' Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232 at p 270: C
>
> > It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal. D
>
> In our judgment, the foregoing passage correctly states the law as it presently stands. But, we would emphasize and make it amply clear that there is no burden on the prosecution to prove its case beyond a reasonable doubt at the close of the prosecution's case. Whether it has done so, is a question that must be dealt with at the close of the whole case. E
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> In *PP v Ong Cheng Heong* [1998] 6 MLJ 678 at p 691, Vincent Ng J expressed his view on the amendment to section:
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> > Thus, to me, maximum evaluation simply means evaluation, on a prima facie basis, of each and every essential ingredient of the charge as tested in cross-examination. In other words, maximum evaluation connotes quantitative rather than qualitative evaluation of the evidence; with focus more on the evidential burden in terms of evidence led rather than the persuasive burden in terms of qualitative degree of proof. F
> >
> > What then constitutes a '*prima facie* case'? '*Prima facie*' means on the face of it or at first glance. To me, in the light of Act A979, perhaps the most appropriate definition of a '*prima facie* case' could be found in the *Oxford Companion of Law* (p 987), which has it as: G
> >
> > > A case which is sufficient to call for an answer. While prima facie evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive. H
> >
> > It would follow that there should be credible evidence on each and every essential ingredient of the offence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon should be rejected. (Emphasis added.) I
>
> The same learned judge in *PP v Saare Hama & Anor* [2001] 4 MLJ 480 at p 491 said:

A In my view the prosecution could be ruled to have 'made out a prima facie case against the accused' when the probative force of the evidence on all the essential elements in the charge taken as a whole is such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts pertaining to such essential elements or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. It is therefore B wrong for a judge or magistrate to require the prosecution to prove that the accused is actually guilty beyond a reasonable doubt before calling for his defence. That requirement for ultimate decision must be postponed until the end of the trial, and — to reiterate — there is no duty cast on the prosecution to actually prove their case beyond reasonable doubt as to the guilt of the accused at the close of the case for the prosecution. In substance, this is what Gordon Smith Ag JA held in *PP v Chin Yoke* (1940) MLJ 47. C

Although we might have expressed the test in different words, we agree with the formulation of the test in *Ong Cheng Heong* and *Saare Hama*. In our judgment, these two cases accurately set out the approach that is to be adopted under ss 173(f) and 180 of the CPC at the conclusion of the prosecution's case.

D If this passage is meant to suggest that the evidence led by the prosecution must receive maximum evaluation, then we would agree with it. But if what is meant is that a court ought to go further and determine whether the prosecution at the end of its case has proved the case against the accused beyond a reasonable doubt, then we find ourselves in disagreement with the learned judge in that case. In our view, subjecting the evidence of the prosecution to maximum evaluation to determine if E the defence is to be called does not mean that the prosecution has to prove its case beyond a reasonable doubt at this intermediate stage.

(See (1) *PP v R Balasubramaniam* (1948) 14 MLJ 119; (2) *Ibrahim v PP* (1962) 28 MLJ 235; (3) *Zahari bin Yeop Baai & Anor v PP* [1980] 1 MLJ 160; and (4) *PP v Ong Cheng Heong* [1998] 6 MLJ 678).

F **[112]** As the evidence of PW6 on the identity of both the accuseds as found by this court is left in a real doubt, this court finds that the prosecution had failed to satisfy the onus of proof which is upon it and the time honoured benefit of doubt must be decided in favour of the accuseds. There is nothing incriminating against the accuseds such as their personal belongings that were recovered from the scene of the crime so as to implicate them of their G presence at the scene of the crime and that they could be the persons who had strangled PW6.

[113] In *Phoon Liat Sum v PP* (1950) 16 MLJ 205, *His Lordship Hill J* in allowing the appeal of the accused against his conviction and sentence said:-

H … some of the evidence on which they were based was capable of a construction equally in favour of the accused.

I feel, therefore, though I confess with some hesitation, that there was a doubt in this case, the *benefit of which it would have been safer to give to the appellant.*

(Emphasis by this court. See *PP v Kasmin bin Soeb* [1974] 1 MLJ 230) I

[114] In *Leow Nghee Lim v Reg* (1956) MLJ 28 at p 29, His Lordship Taylor J said:-

… An accused is entitled to the benefit of anything which can be elicited from the prosecution evidence; the onus is on the prosecution to adduce convincing evidence of the facts … before the onus on any issue is shifted … .

(Emphasis by this court)

[115] In *Mehtab Singh & Ors v State of Madhya Pradesh* AIR 1975 SC 274, Bhagwati J said:-

… It is implicit in this judicial process that if two views of the evidence are reasonably possible, the finding of acquittal ought not to be disturbed.

[116] In *PP v Kau Joo Huat* [1988] 2 MLJ 91 at p 93, His Lordship Lee Hun Hoe CJ said:-

It is a matter of grave doubt whether on the totality of the evidence the prosecution has established that the accused had custody and control of the drug found in the bag. *The benefit of the doubt should have been decided in favour of the accused … .* (Emphasis by this court)

[117] In *Pang Chee Meng v PP* [1992] 1 MLJ 137 at p 142, His Lordship Abdul Hamid Omar LP said:-

… The accused cannot be penalised for lack of ingenuity in police investigations depriving him of the time-honoured benefit of doubt.

[118] On considering the whole of the evidence and from all angles, this court found that the prosecution had failed to establish a *prima facie* case against both the accuseds on the charge of murder and the identity of the person or persons responsible for the offence charged or any other offence on the date, time and place as framed by the prosecution. Also, there is insufficient evidence to invoke the doctrine of common intention under s 34 of the Penal Code against both the accuseds. Accordingly, both the first and second accused were acquitted and discharged without calling for their defence.

First and second accused acquitted.

Reported by Mariette Peters